SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 95

VICTOR LINKLETTER, PETITIONER,

vs.

VICTOR G. WALKER, WARDEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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1

1 **Pauper Case**

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

Miscellaneous No. 648

STATE OF LOUISIANA, EX REL VICTOR LINKLETTER

v.

VICTOR G. WALKER, WARDEN, LOUISIANA STATE PENITENTIARY AND THE STATE OF LOUISIANA

BASIS OF ACTION: Petitioner claims to be illegally confined at State Penitentiary at Angola

For Plaintiff: In Person Requests the Court to appoint Counsel without cost to him.

For Defendant: Jack P. F. Gremillion, Attorney General, State of Louisiana

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2 **Docket Entries**

7/10/62—Filing Petition for Writ of Habeas Corpus—1-25 1

7/31/62—Filing ORDER TO SHOW CAUSE why Writ of Habeas Corpus should not be issued as petitioned by Plaintiff. Issuing notice 8/6/62. Ent. 8/6/62 Hearing 9/7/62 EGW.—26 2

9/ 7/62—Flg. ME—ORDER EGW that hearing on order to show cause why a writ of Habeas Corpus should not issue CONTINUED to 9/21/62, Court requesting Attorney-General's office to file a copy of the transcript of the State Court's proceedings in the record. Issuing notice 9/17/62 and ent. 9/17/62—27 3

9/21/62—Flg. Minute Entry of hearing—written motion to dismiss filed by the State, and IT IS ORDERED that defendant file memorandum within ten days, at which time the matter will be considered submitted. Issuing notice and ent. 9/24/62—28 4

10/ 8/62—Flg. Minute Entry—ORDERED that the time for filing a memorandum in this matter is extended to October 22, 1962. Issuing notice and ent. 10/11/62—32 5

11/ 6/62—Flg. petitioners brief in support of habeas corpus application and in answer to respondent's motion to dismiss.—33-99 x

11/13/62—Flg. Minute Entry—ORDERED that motion to dismiss filed by respondents is GRANTED, and the petitioner's application for the issuance of a writ of habeas corpus is DENIED. Issuing notice 11/14/62 and ent. 11/15/62—100 6

9/20/62—Filing Motion of Defdt. to Dismiss—29-31 4-A

11/27/62—Flg. motion of petitioner for leave to prosecute appeal in forma pauperis and ORDER EGW GRANTING same. FURTHER ORDERED that records be prepared at the expense of the U. S. Government. Issuring notice 11/29/62—101-102 7

11/27/62—Flg. notice of petitioner to appeal to Fifth Circuit Court of Appeals.—103-108 8

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(File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

Miscellaneous No. 648

STATE OF LOUISIANA, EX REL VICTOR LINKLETTER, *Petitioner*,

v.

VICTOR G. WALKER, WARDEN, *Defendant*.
Louisiana State Penitentiary, Angola, Louisiana and
The State of Louisiana

Petition for a Writ of Habeas Corpus—Filed July 10, 1962

To the Honorable, the Judges of the United States District Court, Eastern District of Louisiana, Baton Rouge Division, The Honorables, The Presiding Judges:

MAY IT PLEASE THE COURT:

Your petitioner, Victor Linkletter . . . of . . . Angola, in the Parish of West Feliciana, State of Louisiana . . . a

citizen of the United States and of the State of Louisiana . . . who is . . . petitioner . . . in the above entitled cause and to be known hereafter herein as Petitioner, . . . complaining . . . shows . . . that . . . he is . . . detained and imprisoned in the . . . LOUISIANA STATE PENITENTIARY . . . at . . . Angola, Louisiana, by the above named defendant, after denial to Petitioner of the . . . protection and guarantee . . . under rights afforded under Article one (1), Sections seven (7) and eleven (11) . . ., of the Louisiana Constitution of 1921 . . ., and further in violation of "Due process Of Law" . . ., of the Fourteenth (14) Amendment . . . to the United States Constitution . . ., and after violation of Petitioner's . . . inherent rights under Amendments four (4) and Five (5) of the "Bill of Rights" of the United State Constitution.

Your Petitioner, is now being illegally confined and restrained . . . of his liberty . . . by one charge of . . . Simple Burglary . . . a charge which Petitioner contends he is not guilty . . . which is by virtue of the following, to-wit:

> Under date of September 18, 1958, a Bill of Information No. 161-524, was filed by the Assistant District Attorney Richard McBride, Jr., in Division "E" of the Criminal District Court in the Parish of Orleans, Louisiana.
>
> This Bill was filed against Victor Linkletter, Joseph La Caze, John H. Soldani and Ruth Morrisson. The Information in question charged the said persons with a violation of R S 14 : 62, in that they did commit simple burglary of the building located at 134 Ca-
> 4 rondelet Street, in the City of New Orleans, Louisiana, the property of one Lawrence Federico, with the attempt to commit a theft therein, on August 16, 1958.

WHEREAS, Petitioner respectfully urges this Honorable Court to examine this petition to the end of granting to Petitioner such relief as is consonant with the facts and the Law submitted herein and in accordance with the fundamental "Law of the Land" and leading rulings and decisions of Courts of review.

Statement of Jurisdiction

The basis of the jurisdiction of the Honorable United States District Court, Eastern District of Louisiana (Baton Rouge Division), is predicated on Title 28, U.S.C.A. 2254.

Petitioner filed an original petition for a Writ of Habeas Corpus in the 20th Judicial District Court, Parish of West Feliciana, St. Francisville, La., with the Honorable John R. Rarick, Presiding Judge. The petition was docketed under #2711, a hearing was held at said Court on December 8, 1961. The action was dismissed without considering or adjudicating the merits of the petition.

On December 16, 1961, Petitioner sent a notice of intention to appeal to the 20th Judicial District Court and to all parties made respondents.

On January 5, 1962, Petitioner sent an application for a Writ of Certiorari and a petition for a Writ of Habeas Corpus to the Honorable Supreme Court of Louisiana. This petition was docketed under #45,966 on January 9, 1962. On January 15, 1962 the petition was denied.

On January 19, 1962, Petitioner filed an application for rehearing in the Supreme Court of Louisiana and on February 2, 1962, Petitioner's application for rehearing was denied.

On March 9, 1962, Petitioner filed a petition for a Writ of Certiorari in the Honorable United States Supreme Court, which was docketed under #1134 Misc., October Term, 1961.

On June 18, 1962, The Honorable Supreme Court of the United States denied Petitioner's application for a Writ of Certiorari, the original letters of this denial is attached to this petition.

The Constitutional questions that are being raised by Petitioner in this petition were all contained in each and every previous petitions mentioned herein in this petition.

Notice To the Honorable Court:

Petitioner has previously filed the following two (2) petitions for a Writ of Habeas Corpus in the Federal District Court, New Orleans Division. Petition #1049 was denied on April 7, 1960. Petition #18

Sundry was denied on July 21, 1961. Both denials were by the Honorable Herbert W. Christenberry.

Statement of Facts

The records of the New Orleans Police Department, 2700 Tulane Avenue, New Orleans, La. will reflect under #NOPD 59776, that petitioner was arrested under date of September 12, 1958 and that Petitioner was charged then with a violation of R S 14 : 62 relative to Simple Burglary of 134 Carondelet Street, New Orleans, La., which is the charge that Petitioner now stands convicted of and is now serving 9 years at hard labor.

The above mentioned arrest #59776, occured at 4516 Magazine Street, New Orleans, La., which was the business establishment known as the Crescent City Novelty Shop, which was a business that was owned partly by Petitioner. At the time of this arrest Petitioner was arrested with Ruth Morrison, only, and both were taken to the First District Police station and booked with the crime of this cause. The arresting officers did not have a warrant for arrest, nor as a matter of fact, even inform Petitioner that he was under arrest until arrival at the first district station. The two arresting officers are unknown to your Petitioner and neither of them appeared as witnesses during the trial of this cause #161-524. The crime charged was alleged to have taken place on August 16, 1958. After several hours of detention at the police precinct, both Petitioner and Ruth Morrison were remanded to the Orleans Parish Prison, 531 S. Broad Street, New Orleans, La.

However, previous to the above mentioned arrest #59776, Petitioner was arrested with one Joseph La Caze on Sunday August 24, 1958, about 1:30 P.M. On this date Petitioner and La Caze were observed by various detectives going to and from certain premises 719 Common Street, New Orleans, La While under observation by these members of the New Orleans Police Dept., Petitioner and La Caze were seen carrying certain equipment to the building at 719 Common Street from a parked automobile. Upon leaving said building Petitioner and La Caze were then arrested by two detectives. Petitioner was not in the commission of any crime at the time of this arrest. Immediately after this arrest, Petitioner and La Caze were

taken to the corner of St. Charles and Common Sts., where several other police officers were waiting. Petitioner and La Caze were then placed in a parked police auto-
6 mobile and held prisoner there for almost two hours. During this period of detention, some of the police went to the premises 719 Common Street and conducted a search therein without a search warrant, they had entered this building with a duplicate key that they had made at a previous date, which they had used previously in order to search this same premises, 719 Common Street. After the two hour detention in the parked police auto, Petitioner and La Caze were taken back to the 719 Common Street building an on up to the third floor of this building. Other police were already there and without the permission of the said lawful occupant, Joseph La Caze.

Petitioner was then searched without warrant, and over his protest, the police seized a set of keys from Petitioner's pockets, one of which was for the 719 Common Street premises. The set of keys were kept by the police and were later used by the State as evidence against Petitioner at trial of this cause, #161-524, and Petitioner was prejudiced thereby. Petitioner's attention was then directed to a mass of equipment which consisted of burning tanks, ladders, paint, guns, hammers, etc, etc. . . . which the police said was burglary equipment. The District Attorney at trial of this cause, claimed that this equipment was under Petitioner's control and used some of it as evidence. After being held in the 719 Common Street premises for about one hour, a police photographer arrived and took pictures of Petitioner and La Caze and photos were taken of the various equipment. Then Petitioner and La Caze were taken to the Police District No. 1, and was then booked with four charges involving New Orleans burglaries, which were:

1. Aggravated Burglary, 719 Common Street, New Orleans

2. Simple Burglary, Variety Stag Bar, 134 Carondelet Street

3. Attempted Burglary, Kolb's Restaurant, 125 St. Charles St.

4. Simple Burglary, Siler's Book Store, 130 Carondelet St.

After leaving the 719 Common Street premises and while Petitioner was being booked with the above mentioned charges at the police precinct, other police officers went to the home of Petitioner, 930 Poydras Street, New Orleans, La. On arrival they found Ruth Morrison there, who was the occupant of the moment. At the command of the police, Ruth Morrison opened the apartment door and after the police had harrassed her, they ransacked Petitioner's home without warrant, and seized many articles which were not stolen, but were the personal papers and property of Petitioner. Some of the seized articles were used as evidence by the State against Petitioner at trial of this cause, #161-524. When the police left Petitioner's home with his personal belongings, they also arrested Ruth Morrison and booked her with the same four above listed charges that the police had placed against Petitioner.

The seized articles that were used as evidence against Petitioner during the trial of this cause #161-524 which were taken from Petitioner's home on August 24, 1958, were as following:

7

	Marked
One left shoe	S-34
One right shoe	S-35
One traffic summons	S-26
One screwdriver	S-41
One card with phone numbers and addresses	S-32

On August 25, 1958, Petitioner was taken from the First District Police Jail to his home, 930 Poydras Street, New Orleans, La. The police then conducted a search of the premises without warrant and over Petitioner's protest, seized several cans of paint, two of which were later to be used as evidence at trial of this cause #161-524, the cans of paint were as follows:

Two cans of Paint marked S-42 and S-43

On August 25, 1958, Petitioner was taken from the police precinct for a second time. This time Petitioner was taken to the Crescent City Novelty Shop at 4516 Magazine Street, New Orleans, La., where a search of the premises was made by police without warrant and the police seized several cans of paint over Petitioner's protest. The above mentioned business was owned partly by Petitioner. The State attempted to use the seized paint as evidence at trial of this cause, but the Court rejected this as not being relevant evidence. However, there were police that had made a search of this business establishment, without warrant on Sunday August 24, 1958, and during the trial of Petitioner, the searching police were permitted to reveal as evidence, by oral testimony, as to what they saw at the business establishment during their search of that place.

After three days detention at Police District No. 1, Petitioner's Attorney came and informed him that the District Attorney had rejected a police request for affidavit on all four charges that Petitioner and La Caze were booked with on August 24, 1958. The police continued to hold Petitioner for two more days when the District Attorney filed an Information on a Conspiracy count, which was a new and different charge than any of the four original bookings, which is not the crime which Petitioner now stands convicted of, nor has anyone ever been brought to trial on this conspiracy charge, which is now almost four years old.

Petitioner was eventually taken to the Orleans Parish Prison and was later released on bond on the Conspiracy charge Information #161-357.

Then on September 12, 1958. Petitioner was re-arrested (NOPD #59776) and re-booked with one of the original rejected charges, which was, simple burglary of the Variety Stag Bar, 134 Carondelet Street, New Orleans. Which is the charge of this cause which Petitioner now stands convicted of, which crime was to have taken place on August 16, 1958.

8 Petitioner was then held by the Orleans Parish Criminal Sheriff at the Orleans Parish Prison in lieu of $35,000 Bond, which was for two charges.

1. Conspiracy to burglarize Kolb's Restaurant, 125 St. Charles Street, New Orleans, La.

2. Simple burglary of Variety Stag Bar, 134 Carondelet Street, New Orleans, La.

The Conspiracy charge was alloted to Criminal District Court Section "H" #161-357, and the simple burglary charge was alloted to Criminal District Court Section "E", #161-524.

A preliminary hearing was granted by the Court in Section "H" on the Conspiracy count. During this hearing on October 10 and 14, 1958, the State Prosecutor presented to the Court all of the evidence that was seized through the various searches as described herein along with ten State witnesses who gave oral testimony. All but one testifing witness were to re-appear later for the State as witnesses against Petitioner at trial of this cause, #161-524. After this preliminary hearing, the Court ordered John H. Soldani and Ruth Morrison to be discharged, and for Petitioner to stand trial with Joseph La Caze.

At a subsequent date following some nine months delay, with no request by Petitioner for any continuances, Petitioner was called up for trial of this cause.

The District Attorney for the Parish of Orleans, asked for and was granted a separation for Joseph La Caze and Ruth Morrison, and the State went to trial with respect to Petitioner and John H. Soldani, only.

Under date of May 28, 1959, Petitioner and John H. Soldani, were found guilty as charged by the jury. Certain Bills were taken to the rulings of the Court during the trial and in addition, a motion and supplemental motion for a new trial was filed on behalf of Petitioner and John H. Soldani on October 13, 1959.

On October 13, 1959, Petitioner and Soldani were sentenced to imprisonment in the State Penitentiary at hard labor for nine years, and on October 19, 1959, a motion for a suspensive appeal was filed in Section "E" Criminal District Court, to the Honorable Supreme Court of Louisiana.

On February 15, 1960, judgment was affirmed by the State Supreme Court as to Petitioner, and was reversed as to the co-defendant, John H. Soldani, ordering the latter discharged.

Petitioner's application for a rehearing was denied summarily on March 21, 1960.

On July 7, 1960, Petitioner was delivered to the Louisiana State Penitentiary, at which time Petitioner started to serve the nine year sentence.

Now If It Please The Court, this petition for a Writ of Habeas Corpus flows from the judgment and rulings of the aforestated matters in this petition, arrived at by an illegal arrest, verdict, and trial Courts erroneous and illegal acts, to constitute within even the narrowest latitudes a denial of "Due Process of Law" under the Fourteenth Amendment to the United States Constitution and violations afforded Petitioner under the Constitution of Louisiana of 1921.

ALLEGATIONS AND CONTENTIONS

I

Petitioner was originally arrested on August 24, 1958, without warrant and was booked with simple burglary of the premises 134 Carondelet Street, New Orleans, which crime was to have occurred on August 16, 1958, and is the charge petitioner now stands convicted.

Petitioner's whereabouts were known to members of the New Orleans Police Department for two days prior to his arrest.

When arrested, police did not give petitioner any reason for making the arrest, either on August 24, or on September 12, 1958.

Immediately after petitioner's arrest on August 24, he was taken to, and placed in a parked police auto for almost two hours, then taken into a building No. 719 Common Street, New Orleans and held there for about one more hour, then taken to the First District Station and booked with crime of this cause.

When petitioner was taken back into the 719 Common Street building a search and seizure without warrant was conducted against the person of petitioner. This search and seizure had been against petitioner's will and he had protested this police action at the time of this search and seizure. A set of keys were taken from petitioner's pockets and were later used as evidence against him during trial of this cause, the keys were marked;

Key ring and five keys marked P. G. - S - 27

The police at the time of search of petitioner were committing an illegal act of trespassing of the premises 719 Common Street, New Orleans. They had no search warrant to permit them to go into this building, the building was entered by police with a duplicate key they had made at a previous date and police admit having entered this same building and searched it before, on or about August 20, 1958.

The police gathered up various equipment, which they termed as "burglary equipment" from this building—719 Common Street, New Orleans and later this equipment was used as evidence at petitioner's trial of this cause. The District Attorney claimed this equipment was under petitioner's control. The fact was established during the trial that Joseph LaCaze, who was the other person arrested with petitioner, was the lawful occupant of the 719
10 Common Street building. Petitioner neither leased this property or owned any of the seized equipment and therefore does not claim that he has the right to include the search and seizure, without warrant, for his benefit, however, since the other party whom it was claimed during Petitioner's trial was the leasor of said property and he (Joseph LaCaze) was not on trial with petitioner, it was impossible for Petitioner to explain in necessary detail the purpose of the various seized equipment from the 719 Common Street building. However, Petitioner would like to point out the fact that never at any stage during the entire trial, was the State able to show that the equipment which could have been used to commit the alleged crime as charged was ever actually used by Petitioner for that particular purpose, or in Petitioner's possession on August 16, 1958, the date the alleged crime was to have occurred. Here Petitioner would like to reserve any rights which may be afforded on the States use as evidence of this seized equipment from the premises 719 Common Street; as far as violations of Petitioner's Federal Constitutional rights are concerned.

After three days detention at police precinct No. 1, the police went to the District Attorney with everything they had seized, although petitioner had been booked on August 24, 1958, with four charges involving New Orleans bur-

glaries, *the District Attorney refused to accept all charges.*

After five days detention the District Attorney accepted a new and different charge, which is not the charge of this cause, neither petitioner, or anyone else has ever been called for trial on this other charge which is now more than three years old. (No. 161-357)

It was almost three weeks later after the original August 24, 1958, arrest that petitioner was re-arrested and charged for a second time with crime of this cause, which was on September 12, 1958.

The main complaint of petitioner in paragraph one (1). of these allegations and contentions is the search of "Petitioner's person" and the seizure of the set of keys marked S-27, from the pockets of petitioner which were used as evidence by the State during trial of this cause. Petitioner contends too, that his arrest was based on the "mere belief that he was guilty of a crime" and that such belief had no foundation, since the District Attorney refused all charges when presented to him that Petitioner had been booked with on August 24, 1958.

11 The Court is respectfully asked at this time to read the following excerpts from case #161-524, the trial case of this cause, Tr. 184, 185. Pertaining to the arrest, search and seizure of the person of Petitioner.

Direct Examination,
POLICE MAJOR, WILLIAM J. McNAMARA:

Q. Do you know where Gustafson and Viguirie did in fact arrest LaCaze and Linkletter?

A. Yes, sir, they did.

Q. Did they bring them back in your company?

A. Brought them back to 719 Common Street at my direction.

Q. Where were you?

A. On the third floor of the building 718 Common Street.

Q. How did you get in this building?

A. With a duplicate key we had made when Viguirie and Vogt visited it previously.

Q. Did you make any search of Linkletter or take anything off his person? I mean at that particular time?

A. There were some keys on a chain that were taken. I don't remember whether I took them or somebody else.

* * * *

OFFICER LAWRENCE VIGUIRIE, who was the officer that arrested Petitioner on August 24, 1958, and who appeared as a witness for the State in case #61-357 at a preliminary hearing held in Section "H" on October 14, 1958, said the following:

Direct Examination, Tr. 3

By Mr. Hertz

Q. What about Sunday August 24?

A. Yes, sir, we did.

Q. What did you see and what did you see, if anyone?

A. We saw Jack LaCaze and Vic Linkletter go to a blue car which was parked in front of the building, a Ford, and from the trunk, they took objects out of the trunk, brought it up to the building, they went into the building, closed the door behind them, stayed there for approximately an hour and they came out. They walked on Common Street towards St. Charles Avenue.

Q. What time was this?

A. I would say it was about two O'clock in the neighborhood of 2:00, 2:10.

Q. Did you see them later on or anyone else later on?

A. Saw them when they came out of the building.

Q. Who was this you saw now?

A. Jake La Caze and Vic Linkletter.

Q. Did you see a third man?

A. Yes, sir, I did. The third man got into the automobile, into the Ford, and drove off, drove towards Carondelet Street on Common.

Q. Are you able to identify that third man?

A. Not positively, no, sir.

Page #4 Continued

By Mr. Hertz

Q. What happened next, if anything?

A. When La Caze and Linkletter came out of the building, I was in room 466 in the St. Charles Hotel

with other officers and I received instructions, Paul Gustafson and myself. . . .

By Mr. Braniff: We object to that as being hearsay evidence.

By The Court: Objection Sustained.

12 Examination Resumed By Mr. Hertz:

Q. What did you do, Officer?

A. We arrested La Caze and Linkletter.

Q. What did you do next, if anything?

A. Brought them back to the—in front of the St. Charles Hotel.

Q. What else happened, if anything?

A. They were later brought to 719 Common Street.

Q. What else did you do?

A. After we returned to 719 Common Street, Captain Stevens, Sergeant La Blanc and myself brought them to the First District and booked them.

Cross Examination Page 10 and 11
By Mr. Zelden

Q. You then stated on Sunday, somewhere between 2:00 and 2:10 you saw Jack LaCaze and Linkletter take some objects out of the trunk and walk into the building?

A. Yes, sir.

Q. Could you see what they carried?

A. Sure two-objects wrapped in sacks, several boxes.

Q. You don't know what it was?

A. No, sir.

Q. You can identify it?

A. No, sir.

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Q. After you arrested them, you brought them to the St. Charles Hotel. Your car was there?

A. Yes, sir, by the St. Charles.

Q. Then you drove to 719 Common Street, how far distance was that?

A. Only about half a block.

Q. You took them out of the car and walked up to 719 Common?

A. I left them in the automobile there.

Q. What did you do?

A. I went back to room 466. While I was going to Room 466, I met other officers coming down.

Q. Where were the two prisoners?

A. In the car with Paul Gustafson and another officer.

Cross Examination Page 17 and 18
By Mr. Byrnes:

Q. How long did it take you from the time you arrested Linkletter and LaCaze to the time you brought them to 719 Common Street?

A. Mr. Byrnes, I would have to guess it. It was on a Sunday; it was raining. We had to call a photographer. The photographer was out on a job. Possibly for two hours.

Q. Where was the arrest made?

A. Right on the corner of St. Charles and Canal Street, by Stover's Candy Store.

Page 18

Q. And then you brought them to your squad car?

A. It wasn't my squad car; brought them to a squad car.

Q. From the time you made the arrest, put them in the car and made this call and brought them to 719 Common Street, it was approximately two hours, as a guess?

A. Yes, sir.

13 In view of the foregoing contained in paragraph one (1), it is respectfully submitted to the Court, that the arrest of Petitioner was illegal, that the search of Petitioner's person was illegal and the seizure of the set of keys marked by the State as S-27, and used as evidence in a criminal trial #161-524 against Petitioner, amounted to an "unreasonable" search and seizure and in violation of Petitioner's Constitutional rights under Article one (1), Section Seven (7) of the Constitution of Louisiana of 1921, and also a violation of "Due Process of Law" under that clause of the Fourteenth Amendment (14) and further in

violation of Petitioner's inherent rights under Amendment Four (4) of the Constitution of the United States.

II

On Sunday, August 24, 1958, while Petitioner was being booked at the First Police Precinct, other police officers went to Petitioner's home, 930 Poydras Street, New Orleans, La., they went there without Petitioner, and on arrival, found Miss Ruth Morrison, the officers barged past her when she opened the door and after harassing her, the police then ransacked Petitioner's home and they did not have a search warrant.

According to Court testimony, the police knew for a period of two days before Petitioner's arrest on August 24, 1958, that he resided at 930 Poydras Street, New Orleans, La. and therefore had ample time to procure a search warrant. The crime charged was alleged to have been committed on August 16, 1958, and the arrest and search and seizure of Petitioner's home was eight (8) days later. The articles that were seized from Petitioner's home were his *Personal Papers* and property, they are listed on Page 5 in the "Statement of Facts" in this petition. The State marked these things as; S-34, S-35, S-26, S-41 and S-32. These articles were used as evidence during trial of this cause (#161-524) against Petitioner. None of these seized articles were stolen, or ever claimed to have been.

The police seized a great deal of Petitioner's personal belongings, they sorted through these things, and picked out certain articles that created a set of circumstances which proved highly prejudicial to the cause of Petitioner. The use of Petitioner's *Personal Papers* and other articles as evidence, served only to confuse the jury, and caused them to be completely misled as to the alleged activity of Petitioner on August 16, 1958, the date charged in the Bill of Information, when the crime of this cause was alleged to have occurred.

14 The State used the *Personal Papers* of Petitioner as evidence against him during the trial of this cause (#161-524). This was a card which was inscribed by Petitioner and it listed several addresses and phone numbers, this card was marked by the State as S-32, the card had

no connection with any crime whatsoever, it did not carry the name, address, or phone number of the Variety Stag Bar, the premises that Petitioner was alleged to have burglarized, nor was any other place listed on this card (Marked S-32) the victim of any burglary, yet, this card was used as vidence during the trial of this cause against Petitioner, and Petitioner was prejudiced thereby.

It was the theory of the State, that this card, with writing on it by Petitioner, was a list of prospective victims of burglaries that were to have been burglarized at a later date by Petitioner. As proof of this theory, the State brought a witness into court by the name of "John Schwab", this witness gave testimony on Tr. 219, 220, 221, 222, and 223. John Schwab's testimony was to the effect that Soldani walked up the stairs of the Elk's Club, located at 705 Common Street, New Orleans, La., wanted Schwab to open the safe and demanded money. When Schwab told Soldani no, Soldani left. Schwab further testified the man had no weapon and no mask and said he wanted money.

John H. Soldani was the other person on trial of this cause (#161-524) with Petitioner. The Supreme Court of Louisiana in case #44,939, on February 15, 1960, ruled this story of "John Schwab" to be a "Total Lack of Evidence" against Soldani and ordered him discharged. The name Elk's Club was one of the names inscribed on the card by Petitioner. The State also brought into Court a handwriting expert to prove that the card was written by Petitioner, the fact that Petitioner had written the card in question (S-32) had never been denied by Petitioner. The writings contained on the card were only of a personal nature to Petitioner, and had no bearing on any crime whatsoever, the card was marked by the State as:

One card with phone numbers
and
addresses, Marked S-32

* * * *

The Court is respectfully asked at this time to read the following verbatim account of the testimony relating to the search and seizure at 930 Poydras St., New Orleans, La., on August 24, 1958, then the home of Petitioner. Excerpts from trial of this cause (#161-524). From Tr. 186 and 187.

15 Direct Examination

By Mr. Zibilich

POLICE MAJOR, WILLIAM J. McNAMARA

Q. Now you ultimately left 719 Common?

A. Yes, sir.

Q. Where did you go from there and with whom?

A. John Meredith and I went to 930 Poydras, I believe to apartment 4.

Q. What is that apartment 4?

A. It was the home of Victor Linkletter.

Q. Did you find anyone there?

A. We found Miss Ruth Morrison there.

Q. Did you search the place or do anything while you were there?

A. Yes, sir, we searched the place, Miss Morrison let us in and we conducted a search of the apartment.

Q. What was found in your presence?

A. In the apartment was taken out a pair of crepe sole shoes, a myriad of stuff came out of a drawer which according to Miss Morrison . . .

Q. Don't say what she said.

A. We took a lot of personal papers and a small screwdriver, a whole pillow slip came out of one of the drawers which we took out.

Q. Let me ask you this: had you ever seen the defendant Linkletter at or near 930 Poydras Street prior to this time?

A. Yes, sir, I did.

Q. When and under what circumstances?

A. Friday night, when we first set up a stakeout at the St. Charles Hotel.

Q. Would that be the 22nd?

A. 22nd somewhere around 10 P.M. I was on Common Street near Carondelet talking to Major Guillott when a man and a woman came up to 719 Common, the woman stood near the curb and the man walked towards the door as if he were going to open it. They turned and walked towards Baronne, turned left on Baronne and Captain Stevens and I followed them and they went up to 930 Poydras.

Q. Who were they?
A. Victor Linkletter and Ruth Morrison.
Q. You definitely remember it was 930 Poydras?
A. Yes.

(Petitioner's Underscore)

* * * *

The Court is now respectfully asked to read testimony that was given under oath in case #161-357, Section "H" Orleans Parish Criminal Court. The testimony is by the officer that arrested Petitioner on August 24, 1958.

OFFICER LAWRENCE VIGUIRIE

Direct Examination Page 6

By Mr. Hertz:

Q. Did you have occasion to go to 930 Poydras Street that day?
A. Later, yes, sir, the same day.
Q. For what purpose?
A. We met other officers there.
Q. Did you find anything there?
A. Quite a number of articles taken that belonged to Victor Linkletter. At the time I don't recall all of the articles.
Q. I show you specifically some paint are you able to identify any of these cans?
A. When you ask me about the question on the 24th, we had seen this paint here on the 24th, on a Sunday; but later I went back here on this date, on the 25th, got these cans of paint.
16 Q. What else did you see there?
A. There was clothing, a lot of papers, I don't recall anything other than that.

In view of the foregoing contained in paragraph two (2), it is respectfully submitted to the Court, that the search and seizure of Petitioner's personal belongings on August 24, 1958, articles marked by the State as S-34, S-35, S-26, S-41, and S-32, which were used as evidence against Petitioner during the trial of this cause, #161-524, amounted to an "unreasonable" search and seizure and in violation

of Petitioner's Constitutional rights under Article 1, Section 7 of the Constitution of Louisiana of 1921 and further the search and seizure is "unreasonable" under the Fourth (4th) Amendment to the United States Constitution and is a violation of the rights of Petitioner under the "Due Process of Law Clause" of the Fourteenth Amendment to the Federal Constitution.

In addition, the use of the card marked by the State as (S-32), which was the personal paper of Petitioner and had no connection with any crime, is in violation of Petitioner's rights under the Fifth (5th) Amendment to the Federal Constitution and further in violation of Petitioner's rights under the "Due Process of Law Clause" of the Fourteenth Amendment to the Federal Constitution and further a violation of Petitioner's rights of Article 1, Section 11, of the Constitution of Louisiana of 1921.

The use of the personal card as evidence during the trial of Petitioner was in effect under the Federal Constitution, to compel Petitioner to testify against himself.

Louisiana Law RS 15:45 prohibits searches and seizures to be conducted on a Sunday, the search and seizure described herein was conducted on Sunday August 24, 1958.

III

On August 25, 1958, Petitioner was taken from the First District Police Station to his home at 930 Poydras Street, New Orleans, La., on arrival, the police conducted a search of the premises, without a search warrant and over the Protest of Petitioner, The police had seized several cans of paint and this paint was used later as evidence against Petitioner during trial of this cause, #161-524. The trial Court permitted two of the several seized cans of paint to be used as evidence, they were marked by the State as:

Two cans of paint marked S-42 and S-43

17 The Court is respectfully asked at this time to read the following testimony of the officer that seized the several cans of paint from the home of Petitioner on August 25, 1958. Testimony taken from case #161-357, given under oath in Criminal District Court, Orleans Parish, Section "H" on October 14, 1958 at a preliminary hearing, pages 6 and 7.

OFFICER LAWRENCE VIGUIRIE

Direct Examination

By Mr. Hertz:

Q. I show you specifically some paint, are you able to identify any of these cans?

A. When you ask me about the question on the 24th, we had seen this paint here on the 24th, on a Sunday. But later I went back here on this date, on the 25th. Got these cans of paint.

Q. You saw that there on the 24th?

A. Yes, sir.

Q. Do you know who lived there?

A. Vic Linkletter and Ruth Morrison stated they lived there.

Q. You stated you went back there on the 25th.?

A. That's when we took this can of paint from the residence.

Q. Is that all you took from the residence?

A. That's all I remember. There may have been several cans of paint.

In view of the foregoing contained in paragraph three (3), it is respectfully submitted to the Court that this second search and seizure of the home of Petitioner, without warrant and over the protest of Petitioner, amounts to an "unreasonable" search and seizure. Two of the seized cans of paint were used as evidence against Petitioner during trial of this cause (#161-524), the cans of paint were marked by the State as S-42 and S-43 and Petitioner was prejudiced thereby.

This contended "unreasonable" search and seizure was done in violation of Petitioner's Constitutional rights under Article 1, Section 7, of the Louisiana Constitution of 1921, and further, is in violation of rights afforded Petitioner under the Fourth (4th) Amendment And violation of the "Due Processs of Law Clause" of the Fourteenth (14th) Amendment to the United States Constitution.

IV

On August 25, 1958, Petitioner was taken from the First District Police Station for a second time, and was then

taken to the Crescent City Novelty Shop, 4516 Magazine Street, New Orleans, La., which was a business establishment owned partly by Petitioner. On arrival the police conducted a search of this premises, which was the second time in two days that this premises had been searched without warrant. On this date August 25th, 1958 the police had seived several cans of paint over the protest of
18 Petitioner. When the police were asked if they had a search warrant by Petitioner, they stated that they didn't need one, the police said that they were under instructions to seize anything that could be used for evidence. They left with some tools and the several cans of paint. The paint was later attempted by the State to be used as evidence against Petitioner at trial of this cause, #161-524, but the trial Judge rejected it as not being relevant evidence.

The Court is respectfully asked at this point to read the following excerpts relating to the search and seizure of Petitioner's business establishment 4516 Magazine Street, New Orleans, La., on August 25, 1958. Testimony from case #161-357, Orleans Parish Criminal Court, Section "H".

OFFICER LAWRENCE VIGUIRIE
Direct Examination

By Mr. Hertz:

Q. Did you go to 4516 Magazine Street?
A. We did on the 25th.
Q. Did you take anything from 4516 Magazine Street?
A. Yes, sir, we took some paint from there, green paint.

* * * * *

The Court records in the case of this cause (#161-524) reveal that there had been a search conducted by the police on August 24, 1958 of the said Crescent City Novelty Shop, which was jointly owned by Petitioner, Ruth Morrison and John H. Soldani.

During this prior search by police, the Company books were examined by the police and done without Court order or search warrant and the same police were permitted

over the objection of Petitioner's attorney, to say before the jury certain information that the Company books contained. The police were also permitted to testify as to other things that they saw at said company during their search and Petitioner was prejudiced thereby.

The Honorable Court is respectfully asked at this point to read the following excerpts relating to the search and seizure of the Crescent City Novelty Shop, a business establishment owned partly by Petitioner, the search was conducted on August 24, 1958. Testimony taken from trial of this cause (#161-524) Orleans Parish Criminal Court, Section "E"

Direct Examination, Tr. 157

DETECTIVE JOHN MEREDITH

By Mr. Zibilich:

Q. Who directed you someplace?

A. Ruth Morrison.

Q. What did you do ultimately?

A. The Novelty Shop, but it didn't show much business. Major McNamara examined the books. There was a license what showed that Linkletter, Morrison
19 and Soldani were connected with this Novelty Shop. It was a one room place and they have a back room. I think it is an apartment. In the back there is also a community bathroom.

* * * * *

Direct Examination, Tr. 188

MAJOR WILLIAM J. McNAMARA

By Mr. Zibilich:

Q. Where did you go after you left 930 Poydras Major?

A. Went to the Crescent City Novelty Shop at 4516 Magazine Street.

Q. What is that particular place?

A. It was a novelty shop that sold funny books and records and a lot of other stuff. It was a company operating under the name Crescent City Novelty Shop and the license was issued to Ruth Morrison.

* * * * *

Direct Examination, Tr. 138
MAJOR JOHN BECKER

By Mr. Zibilich:

> During the trial of this cause, (#161-524) this officer was permitted to testify over the objection of Petitioner's Attorney, as to things seen during the search and seizure of the said business establishment, 4516 Magazine Street, on Augus 24, 1958.

* * * * *

When the case of this cause went before the Supreme Court of Louisiana on Appeal in case (#44,939) they had ruled on February 15, 1960, that *all* of the evidence, material or otherwise, in connection with the company known as the Crescent City Novelty Shop, 4516 Magazine Street, New Orleans, La., was "inadmissible" and that the evidence had no bearing whatever to the alleged crime (simple burglary, 134 Carondelet Street) on August 16, 1958.

On the basis of the above mentioned ruling of the Louisiana State Supreme Court in case #44,939 when the case was up on appeal, the Court ordered that Petitioner's copartner in crime (John H. Soldani) be discharged. All of the evidence used against both Petitioner and Soldani in connection with the Crescent City Novelty Shop was ruled to have been a "TOTAL LACK OF EVIDENCE". However, this evidence was used against Petitioner during the trial of this cause and the jury had this Louisiana Supreme Court declared "illegal" evidence before them when they deliberated on the verdict and Petitioner was prejudiced thereby.

See : *Amos* v. *United States*, 225 U.S. 313 (1921)

> "Witnesses may not testify as to what they saw during an illegal search"

* * * * *

20 In view of the foregoing contained in Paragraph Four (4), it is respectfully submitted to the Court that the seizure of "information" from the books of the Crescent City Novelty Shop and by the State permitting this said information to go before the jury, over the protest of Petitioner's Attorney, and as a result the police were permitted to say what they saw during an illegal

search of Petitioner's business establishment, this constituted a search and seizure that was "unreasonable" and contrary to the provisions of the Fourth (4th) Amendment and therefore the introduction of such evidence violated the rights of Petitioner under thhe "Due Process of Law Clause" of the Fourteenth (14th) Amendment to the Constitution of the United States.

It is also submitted that this is an "unreasonable" search and seizure under Article 1, Section 7, of the Constitution of Louisiana of 1921.

V

Legal Authorities Cited

Mapp v. *Ohio,* 81 S. Ct. 1684 (1961).

> "All evidence by searches and seizures in violation of the Constitution is Constitutionally inadmissible in State Courts"

* * * * *

At the time Petitioner was tried, his Constitutional rights not to have illegally seized evidence used against him in a Criminal prosecution, had not been recognized by the United States Supreme Court, *Wolf* v. *People of the State of Colorado*, 338 U.S. 25, 69 S. Ct. 1359. The U.S. Supreme Court held that in a prosecution for a State crime, the 14th Amendment does not forbid the admission of evidence obtained by unreasonable search and seizure though the evidence would be inadmissible in a Federal Court because of a violation of the Fourth Amendment.

The Louisiana Constitution of 1921, Article 1, Section 7, is practically the same, almost word for word, as the 4th Amendment to the United States Constitution, concerning searches and seizures.

In *State* v. *Fleckinger*, et al., 152 La. 337, 93 So. 115, decided April 7, 1922, rehearing denied, the Supreme Court of Louisiana held in substance that evidence illegally seized cannot be excluded or ordered returned before trial if relevant or pertinent to the issue, and that provisions of the Federal Constitution relative to searches and seizures (4th Amend. U.S. Constitition) have no application to State action. On application for rehearing three judges,

O'Niell, St. Paul and Leche, dissented from the majority opinion, denying same.

21 In *State* v. *Mastricovo*, 221 La. 312, 59 So. 2d. 403, the Supreme Court of Louisiana said:

"The jurisprudence of this State is settled beyond any question that relevant evidence, although seized without a search warrant, is non-the-less admissible," Citing:

State v. *Shotts*, 207 La. 899, 22 So. 2d 209;
State v. *Alvarez*, 182 La. 908 So. 162 So. 725;
State v. *Eddings*, 161 La. 240, 108 So. 468;
State v. *Davis*, 154 La. 405, 97 So. 590;
State v. *Lowry*, 153 La. 177, 95 So. 596;
State v. *Mims*, 153 La. 9, 95 So. 264;
State v. *Fleckinger*, 152 La. 337, 93 So. 115;
and *City of Shreveport* v. *Marx*, 148 La. 31, 89 So. 602

* * * * *

LOUISIANA * Effect of illegal search and seizure;

"Evidence otherwise admissible is not made inadmissible because obtained by search and seizure without a search warrant".

State v. *Zeblit*, 152 La. 594, 93 So. 912;
State v. *Tuggle*, 152 La. 747, 94 So. 377;
State v. *Hughes*, 152 La. 929, 94 So. 702;
State v. *Roy*, 152 La. 9, 95 So. 264;
State v. *Lowry*, 153 La. 177, 95 So. 596,
State v. *Weaver*, 157 La. 95, 102 So. 81.

* * * * *

Petitioner in view of the previous jurisprudence of the State of Louisiana at the time of his trial in (1959) had no Constitutional rights available to prevent a denial of his rights as expressed in State and Federal Constitutions, and the filing of a "motion to suppress illegally secured evidence", and reserve bills of exception to the ruling of the Court denying the motion, would in all probability have been a vain and useless act, i.e., in view of the vast number of adverse decisions handed down by the Supreme Court of Louisiana on the question of evidence obtained by illegal searches and seizures.

Petitioner therefore had no rights at the time of his trial in (1959) to prevent a denial of his Constitutional rights as recognized by *Mapp* v. *Ohio, Supra.*

Anticipating that it may be argued that Petitioner, by not objecting to the introduction of the illegally obtained evidence at the time of his trial, has waived his Constitutional right to predicate a Habeas Corpus action on the basis that his conviction was procured by illegally seized evidence obtained without a search warrant. Petitioner calls to the attention of the Court to the case of *Medberry* v. *Patterson,* 174 Fed. Supp. 720, which had for consideration an identical argument on habeas corpus application, said the court on Pape 724:

> "there is no doubt that one convicted of a crime may waive a constitutional right by failing to raise the question when orderly procedure requires that it be put in issue. *Brown* v. *Allen,* (1953) 334, U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469; *Ex Parte Spencer* 1913, 288 U.S. 652, 33, S. Ct. 709, 57 L. Ed. 1010. But it is also well settled that a constitutional right cannot be waived when the accused did not know or could not have known that one of his constitutional rights was violated and it is a matter of fact that no one knew or could have known in 1940 that the equal protection of the Fourteenth Amendment to the United States Constitution requires a state to furnish a free transcript to indigent defendants when that is the only method by which they may secure an adequate review and when the state allows as a matter of right." (Petitioner's Underscore)

Anticipating that it may be argued that the Petitioner is not entitled to relief because the *Mapp* v. *Ohio* Supra, cannot be retroactive, Petitioner's rights to invoke this decision in its principle has been conclusively settled by the United States Supreme Court in *Eskridge* v. *Washington State Board of Prison Terms and Paroles,* 357 U.S. 214, 78 S. Ct. 1061 2 L. Ed. 2nd 1269, (1958), by affirmatively sanctioning the retroactive effect of its decision in

Griffin v. *People of the State of Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 . . . .

* * * * *

Enlow v. *State*, 125 N.E. 2nd. 250.

Unlawful arrest cannot be the foundation of a lawful search, nor will information obtained by an unlawful search furnish the basis for a lawful arrest; and where and arrest or search is unlawful in the beginning, it it not made lawful by what afterwards takes place.

Cunningham v. *Baker*, 104 Ala. 160, 16 So. 68, 53 A.S.R. 27.

An Officer making an arrest has authority to search the person of his prisoner, but a search is justifiable only as an incident to a lawful arrest. If the arrest is unlawful the search is also unlawful.

Motovina v. *Hult*, 123, N. E. 2nd. 893.

An officer arresting without a warrant cannot justify his action in holding or detaining a prisoner for an unreasonable time before obtaining a warrant upon the grounds that such delay was necessary in order to investigate the case and procure evidence against the accused.

Angelo .. *United States*, 269 U.S. 20 (1925) 292, 295.

"Belief however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant and such searches are held unlawful not withstanding facts unquestionably showing probable cause".

Gouled v. *United States*, 225 U.S. 298 (1921); 292, 295.

Use in evidence, of papers seized in a search, unconstitutional under Amendment four (4), is in effect to compel defendant to become a witness against himself.

23 *Boyd* v. *United States*, 116 U.S. 616, (1886).

"A search and seizure of private papers in effect compels a man to testify against himself in violation of the Fifth Amendment privilege against self-incrimination, and therefore such a search and seizure

is unreasonable, and repugnant to the Fourth Amendment."

"There is a Constitutional difference between a search for things which are themselves prohibited such as stolen goods, and a search for books and papers sought as evidence, the latter being illegal".

People v. *Conway*, 225 Mich. 152, 195 N.W. 679 (1923).

It is also settled law that where the search is incidental to an arrest, the arrest, must occur before the search, and the search must be completed at the time of arrest.

Bram v. *United States*, 168 U.S. 532, 18 S. Ct. 42 L. Ed. 568, 10 A.M. CRIM. REP. 547.

Here Petitioner respectfully asks this Honorable Court to note the unusually strong language employed in the assailing of *unlawful searches and seizures.*

McDonald v. *United States*, 335 U.S. 445, 456, 69, S. Ct. at Page 193:

"The presence of a search warrant serves a high purpose and function, absent some grave emergency. The Fourth Amendment has interposed a magistrate between the citizen and the police. . . ."

Lisenba v. *People of State of California*, 314 U.S. 219, 236, 62 S. Ct. 280, 290, 86 L. Ed. 166.

"It is also established that the Fourteenth Amendment forbids, "Fundamental Unfairness in the use of evidence whether true or false."

Amos v. *United States*, 225 U.S. 313 (1921).

"Witnesses may not testify as to what they saw during an illegal search."

Angello v. *United States*, 46 S. Ct. 4, 269 U.S. 20, 70 L. Ed. 145, 51 A. L. R. 409.

"Held that evidence must be excluded, though the things seized were contraband, and though there had been no motion before trial if the facts were undisputed."

Weeks v. *United States*, 232 U.S. 383.

"and if a suspect, arrested without a warrant or without the existence of probable cause, is searched and

articles implicating him in crime are found, they may not be used as evidence in federal court."

Henry v. *United States*, 361 U.S. 98.

"Arrests on suspicion are not Constitutional."

People v. *Sovetsky*, 342 Ill. 583, 588, 175 N.E. 844, 846 (1931).

"The goods to be seized under a search warrant must be described with such certainty that they may be identified and with such particularity that the officer charged with the execution of the warrant will be left with no descretion respecting the property."

24 *Sgro* v. *United States*, 287 U.S. 206, 210 (1932).

Chief Justice Hughes once explained the underlying reason for the rules when he said:

"The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the 4th Amendment, and this together with legislation regulating the process should be liberally construed in favor of the individual."

Johnson v. *United States*, 333 U.S. 10 (1948).

"A search of the person is not lawful if its purpose is to discover grounds as yet unknown for an arrest, and in such a situation the search does not become lawful because of what is found."

United States v. *Lefkowitz*, 285 U.S. 452 (1932).

"But it has been held that the authority to search a house or place of business incidental to a lawful arrest is certainly not greater than that conferred by a search warrant. It follows that private papers wanted solely as evidence which could not be seized even under a search warrant issued upon ample evidence may not be taken as incidental to an arrest. (Petitioner's Underscore)

VI

Summation

While Petitioner even in his hunger for justice, is loath to point the accusing finger at the State of Louisiana for its over-zealousness in quest of a conviction, it must be abundantly clear to this Honorable Court, that the forces of Orleans Parish and the State of Louisiana, did merge, into a cabal, under the cloak of authority to mount the semblance of a case against Petitioner.

Your Petitioner, unlettered at Law, humbly apoligizes to this Honorable Court for any crudities that may possible affront the legal mind and asks the Courts indulgence.

Wherefore, To Be Relieved From Which Said Detention and Imprisonment, your Petitioner now applies, praying that a Writ of Habeas Corpus, to be directed to the said Victor G. Walker, Defendant, may issue in this behalf pursuant to the statute in such case made and provided, so that your Petitioner may be forthwith brought before this Honorable Court to do, submit to and receive what the law may require.

Certificate

Petitioner does hereby certify that a copy of the foregoing petition has been mailed postpaid, to the Hon.
25 Jack P.F. Gremillion, Attorney General for the State of Louisiana, State Capitol Building, Baton Rouge, Louisiana.

Due to the fact that Petitioner is a prisoner without the normal facilities available in these matters, return of service upon the Warden, the Defendant, Victor G. Walker, cannot be effected. But Petitioner does affirm that the Warden has been handed a copy of this petition.

* * * * * * * * * * *

Duly sworn to by Victor Linkletter jurat omitted in printing

(File endorsement omitted)

26 IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

Miscellaneous No. 648

(Title omitted)

Order to Show Cause—July 30, 1962

Upon the petition of Victor Linkletter, relator and petitioner in proper person, for issuance of a writ of habeas corpus,

IT IS ORDERED that Victor G. Walker, Warden of Louisiana State Penitentiary, and Jack P. F. Gremillion, Attorney General of the State of Louisiana, show cause before this Court at Baton Rouge, Louisiana, on September 7, 1962, at 2:00 o'clock p.m., why a writ of habeas corpus should not issue herein as prayed for.

IT IS FURTHER ORDERED that service of the order to show cause on respondents, Victor G. Walker, Warden of Louisiana State Penitentiary, and Jack P. F. Gremillion, Attorney General of the State of Louisiana, on or before August 10, 1962, at 12:00 noon, be deemed sufficient service.

/s/ E. GORDON WEST
United States District Judge

Dated July 30, 1962

Victor Linkletter
Victor G. Walker w/ copy of petition
Jack P. F. Gremillion w/ copy of petition

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27 **Minute Entry of Order for Continuance—September 7, 1962**

(Omitted in printing)

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28 **Minute Entry of Order for Defendant to File Memorandum, etc.—September 21, 1962**

(Omitted in printing)

(File endorsement omitted)

29 IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

(Title omitted)

Motion to Dismiss Complaint—Filed September 20, 1962

The defendant moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

/s/ JACK P. F. GREMILLION
Attorney General
State of Louisiana

/s/ SCALLAN E. WALSH
Assistant Attorney General
State of Louisiana

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30 **Notice of Motion to Dismiss Complaint and Affidavit of Scallan E. Walsh**

(Omitted in printing)

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32 IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

Docket No. 648—Miscellaneous

(Title omitted)

Minute Entry Extending Time to File Memorandum—October 8, 1962

At request of counsel for respondent, the time for filing a memorandum in this case is hereby extended to October 22, 1962.

E.S.W.

Jack P. F. Gremillion, Esq.
Victor Walker

(File endorsement omitted)

33 IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

BATON ROUGE DIVISION, LOUISIANA

No. 648

Miscellaneous

STATE OF LOUISIANA, *Ex. Rel.*

VICTOR LINKLETTER, *Petitioner*

VS.

VICTOR G. WALKER, *Defendant, and The State of Louisiana*

Petitioner's Brief in Support of Habeas Corpus Application, and in Answer to Respondent's Motion to Dismiss—Filed November 6, 1962

JURISDICTION

This matter is properly before this Honorable Court as a result of an original petition for a writ of Habeas Corpus filed by the above named petitioner in this Court on July 9, 1962. Petitioner has exhausted all remedies in the Louisiana State Courts, including application for a Writ of Certiorari to the United States Supreme Court.

* * * *

MAY IT PLEASE THE COURT:

The case before the bar engages the Court in an effort to effectively apply basic facets of the Constitution and offers an occasion again to bring forth the inherent rights, available to each and every citizen, and to restore him to his liberty in the tradition of the judicial system of the United States Government and within the confines of the true and just interpretation of "Due Process of Law", of the Constitution of the United States.

State of Louisiana, ex rel, Victor Linkletter respectfully submits this brief, which has been written by petitioner in answer to the Respondent's Motion To Dismiss Petitioner's Habeas Corpus application which Motion To

Dismiss was filed in this Court on October 22, 1962, and respectfully Petitioner points out the following:

STATEMENT OF FACTS

Answering paragraph 1, Pages 2, 3 and 4 of the Respondent's "Brief To Dismiss".

Petitioner has no doubt that there was a simple burglary committed at the premises No. 134 Carondelet Street, in the City of New Oreans, Lousiana, on the 16th. of August 1958 as the Respondent alleges. However guilty in the eyes of the Law, Petitioner was convicted for a crime which he had never committed.

None of the burglar tools that the police had found
34 at the scene of the crime on the morning of August 17, 1958 were ever owned by Petitioner or ever in his possession and no court witness had ever made such a claim.

It was the opinion of a paid State witness, one John Koch, that a certain paint found on a crowbar that was left by the burglars at the scene of the crime could have been the same paint as that seized from Petitioner's home 930 Poydras Street. Mr. Koch under cross examination also stated "that he could have made one test at his Lab that could have proven beyond all doubt if the paint on the crowbar and the paint found at the home of Petitioner was the one and same paint. When Mr. Koch was asked by Petitioner's attorney why he did not make such a test, he said, that he did not have the time to make such a test."

Petitioner would like to point out here that he was made to wait nine (9) months before he had been called up for trial on this case, No. 161-524.

The cans of paint in question were marked by the State as S-42 and S-43 and were used during the trial as evidence during the trial of this cause.

Under the Respondent's statement of facts at the bottom of Page 2 and top of Page 3 of their Brief, the fact is stated "that (LINKLETTER) was observed by Officers in the act of opening the window on the third floor of the building 719 Common Street, climbing out on the roof and reentering the building. At this time he did not have on a shirt and was wearing a pair of gloves."

PETITIONER CONTENDS THAT THE STATEMENTS ARE NOT TRUE AND THAT PETITIONER NEVER CLIMBED OUT OF ANY WINDOW, OR REENTERED AND WINDOW AT 719 COMMON STREET, OR AT ANY OTHER PLACE.

THERE WAS NO STATE WITNESS DURING THE ENTIRE COURSE OF THE TRIAL OF PETITIONER NO. 161-524, THAT EVER MADE SUCH A CLAIM.

In support of Petitioner's contention as to the untruth of the Respondent's claim, excerpts from the trial of this cause No. 161-524 are shown below.

May 27, 1959, witness for the State,

OFFICER JUSTIN FAVALORA
Under Direct Examination Page 131

By Mr. Zibilich:

Q. What were you in Kolb's?
A. We were on the third floor of Kolb's.
Q. Say WE, who was with you?
A. Officer Fernandez.
Q. You were on the third floor of Kolb's?
A. In the back part in the quarters facing the rear end of 719 Common St.
Q. Did you observe anything while you were looking at this third floor apartment of 719 Common St?
A. Yes Sir. I would say approximately about 2:30, I noticed Victor Linkletter in the third floor without a shirt on and a pair of brown gloves on.
Q. Wearing the gloves?
A. Yes Sir.
Q. What did you do if anything?
A. He came to the window where that is, where I recognized him and he just kept walking around, he would g[illegible] close by the window and then he would disappear and then he would appear at the window.
Q. Did he ever open the window?
A. No Sir, but if I remember right the window was half way open.

By the Court: Page 131.

Q. Did you observe anything else after this?
A. No Sir.

Page 132-

Q. Where was your partner Fernandez?
A. Standing by me, right there.

* * * * *

The same question concerning whether or not anyone had ever gone out on the 719 Common Street roof on August 24, 1958 came up during a preliminary hearing in Judge Bagert's Court "Section H" case No. 161-357 and it was positively stated that nobody had entered on any roof. For this very reason the Orleans Parish District Attorney would not accept any charges of attempted burglary against Petitioner and others as the police had requested he do several days after the August 24, 1958 arrest. At this time the police had tried to have Petitioner charged with Attempted Burglary of Kolb's Restaurant, hence there was no attempt, so there was no charge.

Petitioner further contends that nowhere in the trial court records will it show that there was ever any claim by any of the State witnesses that Petitioner had ever been seen on any roof such as described to this Honorable Court in the Respondent's Brief as filed in this Court on October 22, 1962.

At the top of Page 3 of Respondent's Brief the statement is made that the Petitioner and La Caze were immediately after an arrest on August 24, 1958, taken back to the third floor of the premises located at 719 Common Street.

PETITIONER CONTENDS THAT THE ABOVE STATEMENT BY THE RESPONDENT IS NOT TRUE * * * AND IN SUPPORT OF YOUR-PETITIONER'S CONTENTION, THE ENTIRE COURT TESTIMONY FROM CASE NO. 161-357 SECTION H, IS NOW SUBMITTED AS GIVEN BY OFFICER LAWRENCE VIGUIRIE IN THAT CASE, THE TESTIMONY IS MARKED AS APPENDAGE "A". PETITIONER HOLDS THE ORIGINAL SIGNED AND CERTIFIED COPY. THE ARREST IS THE ONE AND SAME THAT THE RESPONDENT SPEAKS OF ON 14th. AUGUST 1958. PETITIONER HAD TRIED TO OBTAIN THIS OFFICERS' COMPLETE TESTIMONY FROM THE COURT SECTION "E" CASE NO. 161-524, BUT COULD NOT GET AN ANSWER BY MAIL.

36 Petitioner here asks the Honorable Court to read the following excerpts as taken from Case No. 161-357, Section "H".

OFFICER LAWRENCE VIGUIRE

Page 15 Appendage "A"

Q. Were you there when they brought Linkletter and La Caze back from being arrested on St. Charles near Canal Street? You participated in the arrest personally?

A. Yes, sir, Paul Gustafson and myself.

Q. After you arrested them, you brought them to the St. Charles Hotel. Your car was there?

A. Yes, sir, by the St. Charles.

Q. Then you drove to 719 Common Street. How far distance was that?

A. Only about half a block.

Q. You took them out of the car and walked up to 719 Common?

A. I left them in the automobile there.

* * * *

PETITIONER WOULD LIKE TO DIRECT THE COURT'S ATTENTION TO PAGES 17 AND 18 OF APPENDAGE A WHERE OFFICER LAWRENCE VIGUIRIE'S SHOWS THAT PETITIONER AND LA CAZE WERE HELD IN A PARKED POLICE AUTOMOBILE FOR ALMOST "2" HOURS BEFORE BEING BROUGHT BACK TO THE 719 COMMON STREET BUILDING, AND THIS IS NOT AS THE RESPONDENT CLAIMS IN THEIR BRIEF.

* * * *

During the course of the trial of this cause No. 161-524, a witness for the State under cross examination made the following statements.

DETECTIVE JOHN MEREDITH:

Page 164, and 165

By Mr. Byrnes:

Q. When you went with Major Mc Namara to 719 Common, that was August 24, 1958.

A. Right sir.

Q. And everything you are speaking of about what you saw at 719 Common St. was on the 24 of August, am I right?

A. Right Sir.

Q. From there do you know where Linkletter and La Caze were arrested?

A. Was I present?

Q. Do you know where they were arrested?

A. On St. Charles near Canal.

Q. And were they at 719 Common before you arrived or after you arrived?

A. I didn't arrest them.

Q. And were they at 719 Common before you got there or after?.

A. We went up to 719 and they were brought back to 719.

Q. How long after you got there was Mr. Linkletter and Mr. La Caze brought in?

A. Referring to the third floor at 719?

37 Q. Yes.

A. Couldn't have been more than 10 or 15-fifteen minutes.

THE CONTENTION OF PETITIONER IS THAT THE ABOVE SHOWN EXCERPTS SHOW THAT PETITIONER WAS NOT IMMEDIATELY TAKEN BACK TO THE 719 COMMON STREET BUILDING AS THE RESPONDENT ALLEGES ON THE TOP OF PAGE 3 OF THEIR BRIEF ON THE MOTION TO DISMISS.

The respondent further alleges to this Honorable Court on page 3 of their brief that Petitioner and La Caze were brought back to the premises 719 Common Street, that upon the roof of this building, they found burglar equipment and tools.

PETITIONER CONTENDS THAT THIS STATEMENT BY THE RESPONDENT IS NOT TRUE AND THAT NOWHERE IN THE ENTIRE CASE WAS THIS CLAIM MADE, OR *ANY MENTION* OF ANY TOOLS OR EQUIPMENT FOUND ON ANY ROOF EVER MADE IN ANY COURT TESTIMONY WHATSOEVER, NOR WAS THERE ANY TESTIMONY OF ANY OF THE STATE WITNESSES THAT ANY OF THE EQUIPMENT ALLEGED TO HAVE BEEN BURGLARY EQUIPMENT WHICH WAS FOUND IN THE PREMISES 719 COMMON STREET, WHICH COULD HAVE BEEN USED FOR THE BURGLARY OF THE VARIETY STAG BAR, 134 CARONDELET STREET, WAS EVER ACTUALLY USED BY PETITIONER OR BY ANYONE ELSE FOR THAT PARTICULAR PURPOSE OR EVEN IN PETITIONER'S POSSESSION ON AUGUST 16, 1958, THE DATE THE ALLEGED BURGLARY WAS TO HAVE OCCURRED. THE ENTIRE CASE OF THE STATE WAS BASED ON THEORY OF CIRCUMSTANTIAL EVIDENCE.

Petitioner asks the Honorable Court to refer to Page 4 of Appendage "A" which will show that there were no

tools or equipment ever found on the roof of the 719 Common Street as the Respondent has presented to this Court in their Brief.

OFFICER LAWRENCE VIGUIRIE,

Page 4 of Appendage "A",

Q. Did you go upstairs in 719 Common Street?
A. Yes, sir.
Q. Which floor?
A. Well, it would have been the second floor.
Q. The second floor?
A. It would have been the top floor, the third floor. The basement floor, the second, it would have been the third floor.
Q. What did you find there?
A. There was an oxygen tank, an acetelene tank, extention ladder, crow bars, burning torch, three weapons; might have been other things I don't recall.

Page 5-

Q. Officer, I show you State Exhibit 6, are you able to identify the subject matter of that photograph?
A. Yes, sir.
Q. What is that?
A. On our return to 719 Common Street, on the uppermost floor, this is how we found the oxygen tank and the acetelene cylinder, the box containing the tools which were all secured at the time. It was back up here on this platform like, which we later dusted for prints, and it contained I think a thirty-eight caliber revolver and holster.

38 Q. Was anything—Does that picture represent a true picture of the way things were when you saw them first, Officer Viguirie?
A. As near as I can remember it does.

Page 12-

Q. You say that S-6 represents to the best of your recollection a true picture of what was on that platform when you walked in with the other arresting officer, is that correct?
A. I would say this is just about it. If I'm not mistaken this box may have been moved. When I got there, after we called for a photographer, the photo-

grapher took these pictures, after taking the pictures, the Bureau of Identification went all over evidence for fingerprints.

Page 16-

Q. And all this paraphernalia was on this platform as portrayed in this photograph?

A. Yes, sir.

PETITIONER CONTENDS THAT THE ABOVE SHOWN EXCERPTS SHOW THAT THERE WAS NO CLAIM THAT ANY TOOLS OR EQUIPMENT WERE FOUND ON A ROOF AT THE 719 COMMON STREET BUILDING ON AUGUST 24, 1958 AS THE RESPONDENT ALLEGES IN THEIR BRIEF TO THIS HONORABLE COURT AND FURTHER, PETITIONER CONTENDS THAT NO WITNESS AT ALL EVER MADE ANY SUCH CLAIM DURING THE ENTIRE COURSE OF THE TRIAL NO. 161-524, SECTION "E".

On Page 3 of the Respondent's Brief it is stated as following:

". . . that officers searched Linkletter's person and found a key to his home 930 Poydras Street"

THIS STATEMENT IS CORRECT, THE ABOVE MENTIONED SEIZED KEY WAS LATER MARKED BY THE STATE AS S-27 AND USED AS EVIDENCE DURING THE TRIAL OF THIS CAUSE.

However, just after the above statement of the Respondent, they claim as follows,

". . . and thereupon took Linkletter with them to his apartment at 930 Poydras Street . . ."

PETITIONER CONTENDS THAT THIS STATEMENT AS ALLEGED BY THE RESPONDENT IN THEIR BRIEF IS NOT TRUE AND THAT WHEN THE POLICE WENT TO THE HOME OF PETITIONER 930 POYDRAS STREET ON 24 AUGUST 1958, THEY WENT *ALONE* AND NOT WITH PETITIONER AS CLAIMED.

THE HOME OF PETITIONER WAS ABOUT 7 BLOCKS FROM WHERE THE AUGUST 24 ARREST TOOK PLACE AND JUST ABOUT AS FAR FROM THE SAID 719 COMMON STREET BUILDING.

THERE WAS NO GREEN PAINT SEIZED FROM PETITIONERS HOME ON AUGUST 24, 1958 AS THE RESPONDENT CLAIMS IN THEIR BRIEF AND NO WITNESSES HAD EVER MADE THIS CLAIM DURING THE ENTRE COURSE OF THE TRIAL.

NEVER AT ANY STAGE OF THE ENTIRE TRIAL HAD THERE EVER BEEN ANY CLAIM THAT ANY PAINT EVER SEIZED AT THE HOME OF PETITIONER MATCHED PAINT FOUND ON TWO

CROWBARS FOUND ON THE ROOF OF THE BUILDING AT 719 COMMON STREET.

AS A MATTER OF FACT, THERE IS *NO TESTIMONY* IN THE ENTIRE RECORDS OF THE COURTS (SECTION H OR SECTION E) THAT ANY CROWBARS WERE EVER FOUND ON *ANY ROOF WHATSOEVER* AS THE RESPONDENT ALLEGES IN THEIR BRIEF TO THIS COURT. THERE WAS NO TESTIMONY GIVEN THAT EVER CLAIMED THAT ANY PAINT WAS EVEN ON ANY CROWBARS THAT WERE FOUND AT THE 719 COMMON STREET BUILDING.

39 PETITIONER in support of his contentions asks the Honorable Court to read the following excerpts as can be found in the testimony of one Officer Lawrence Viguirie on Page 4 of Appendage "A" which is as follows:

Q. What did you do, officer?
A. We arrested La Caze and Linkletter.
Q. What did you do next, if anything?
A. Brought them back to the—in front of the St. Charles Hotel.
Q. What else did you do?
A. After we returned from 719 Common Street, Captain Stevens, Sergeant Le Blanc and myself brought them to the First District and booked them.

Page 6-

Q. Did you have the occasion to go to 930 Poydras Street that day?
A. Later, Yes, sir, the same day.

Page 12-

Q. Then you took them back out and booked them?
A. Yes, sir.
Q. You were there when they were booked?
A. Yes, sir.
Q. Did you book them?
A. No, sir, Captain Stevens.
Q. What were they booked with?
A. Probably 107, investigation of burglary of Kolb's Restaurant.

The following are excerpts from the trial of this cause No. 161-524, Section "E" as given by one of the State witnesses on Tr. 186-187.

Direct Examination

POLICE MAJOR, WILLIAM J. McNAMARA

By Mr. Zibilich:

Q. Now you ultimately left 719 Common?
A. Yes, sir.
Q. Where did you go from there and with whom?
A. John Meredith and I went to 930 Poydras, I believe to apartment 4.
Q. What is that apartment 4?
A. It was the home of Victor Linkletter.
Q. Did you find anyone there?
A. We found Miss Ruth Morrison there.

The above shown testimony of Officer Lawrence Viguirie and that of Police Major Wm. J. McNamara tend to show that Petitioner was not taken to his home on August 24, 1958 as the Respondent alleges in their Brief to this Court.

As a Matter of Fact, Petitioner's attorney Leonard A. Calcagno was at the police precinct talking with Petitioner when the police arrived there with Miss Ruth Morrison which time they also booked Miss Morrison with all the same charges that they had booked Petitioner with and this Attorney had made the police at that time give him a receipt for some diamond rings that they had seized from the fingers of Miss Morrison, the police were just coming from searching the home of Petitioner and without Petitioner being present.

About the center of Page 3 of the Respondent's brief, they state as following:

"... and also found a traffic summons issued to Linkletter on August 14th, two days prior to the burglary. ..."

PETITIONER DENIES THIS ALLEGED FACT AS PRESENTED TO THIS HONORABLE COURT BY THE RESPONDENT SINCE THERE WAS NEVER ANY TRAFFIC SUMMONS SEIZED BY THE POLICE WITH THAT DATE AUGUST 14, 1958 AS CLAIMED IN THE RESPONDENT'S BRIEF.

During the Search of Petitioner's home on August 24, 1958, the police had found in one of the dresser drawers a

traffic summons issued to Petitioner, This traffic summons was issued to Petitioner by one Officer Ralph Fink of the New Orleans Police Dept. and was given to Petitioner while at S. Broad St. and Tulane Avenue while heading in the direction of Baton Rouge.

THE SUMMONS No. B * 54098 was issued on August 20, 1958 and not on August 14, 1958 as the Respondent alleges.

The auto driven by Petitioner was owned by one of Petitioner's business associates, John H. Soldani and this automobile was often used in connection with the business activities of the Crescent City Novelty Company located at 4516 Magazine Street, New Orleans, La., which was a Company owned by Miss Ruth Morrison, John H. Soldani and Petitioner.

The said traffic summons was for the amount of $1.00, the said summons was used as evidence during the trial of this cause and was marked by the State as S-26.

THE RESPONDENT GOES ON TO SAY IN THEIR BRIEF AS FOLLOWS:

> "... that this vehicle had been used to convey persons who had rented from the Industrial Air Brakes of the South, a tank of oxygen and a tank of aceteyline. Four crowbars were noticed in the trunk of the care on August 14th. ..."

PETITIONER WOULD LIKE TO POINT OUT THE FACT THAT THE RESPONDENT DOES NOT CLAIM HERE THAT THE SAID VEHICLE SPOKEN OF WAS USED BY PETITIONER OR BY ANYONE ELSE CHARGED WITH THE CRIME OF THIS CAUSE TO CONVEY THE SAID TANKS THAT HAD BEEN RENTED FROM SAID COMPANY, THE RESPONDENT MERELY SAYS "TO CONVEY PERSONS"

41 PETITIONER CONTENDS that he had never driven said vehicle on the day of August 14, 1958 as the Respondent has alleged in their Brief to this Honorable Court, further there was not one single witness that ever testified that the said Soldani owned car was ever used in the alleged simple burglary of this cause on the day of the alleged crime August 16, 1958.

THE FOLLOWING are names of persons that worked for the Industrial Air Products of the South, (now called Gen-

eral Dynamics, located at 907 S. Peters Street, New Orleans, Louisiana.)

1. Mr. Oren Hymel
2. Mr. Eugene Tanguys
3. Mr. Joseph Morris
4. Mr. Charles Brecka

EACH AND EVERY ONE of these above listed persons testified in a Court of Law under OATH that not only Petitioner, but that none of the others charged with the crime of this cause EVER CAME to their Company at any time whatsoever, this would mean that other persons than those charged were those that went to the said Air Products Company when tanks were rented on the days of August 14th. and August 19th., 1958.

ON AUGUST 14th., 1958, Mr. Oren Hymel sold two tanks, one oxygen, one acetelyne, to a Mr. Joseph Cramer of Buras, Louisiana and during the transaction of this sale he copied down the license number of the vehicle making the purchase and then turned this over to his boss Mr. Brown, at this time the police were called and on their arrival were given the copied down license number, the piece of paper that the number had been copied down on was retained by Mr. Hymel and after the police had left, Mr. Hymel had destroyed the paper containing the number and had thrown it away.

SEVERAL DAYS LATER, after the search and seizure of the traffic summons No. B-54098 from the dresser drawer at the home of Petitioner, 930 Poydras Street, which was the only traffic ticket issued to Petitioner, the Police had gone back and had a talk with Mr. Hymel, and at this time, Mr. Hymel was told that he had given them the wrong license number and then at that time Mr. Hymel was handed a new number, which was the same number as contained on the traffic summons No. B-54098.

DURING THE TRIAL OF THIS CAUSE No. 161-524, Mr. Hymel stated under oath when shown photos of the Soldani car; that he could not say that that was the auto, and that the license number was not the same.

42 A DRAY RECEIPT WHICH WAS OBTAINED FROM THE SAID AIR PRODUCTS COMPANY WAS MARKED BY THE

STATE AND USED AS EVIDENCE AGAINST PETITIONER DURING THE TRIAL OF THIS CAUSE (RECEIPT NO. 25558) (MARKED BY THE STATE AS S-28), HAD SHOWN THE PURCHASE OF TWO TANKS THAT WERE SOLD TO ONE JOSEPH CRAMER OF BURAS, LOUISIANA ON 14TH. AUGUST 1958.

THE ABOVE MENTIONED TANKS ARE THOSE THAT THE RESPONDENT REFERS TO IN THEIR BRIEF TO THIS COURT, THESE TANKS WERE NEVER BROUGHT INTO COURT AS EVIDENCE, OR AS FAR AS PETITIONER KNOWS, THEY WERE NEVER POSSESSED BY THE POLICE.

IF ANY TANKS AT ALL THAT ARE REFERRED TO IN THE RESPONDENTS BRIEF WERE USED DURING THE TIME OF THE ALLEGED SIMPLE BURGLARY INVOLVED IN THIS CASE, THEN THE ABOVE MENTIONED SET OF TANKS WOULD HAVE TO HAD BEEN THE ONES USED. THE SET OF TANKS THAT WERE BROUGHT INTO THE COURTROOM AS EVIDENCE DURING THE TRIAL OF THIS CAUSE WERE ACTUALLY IN THE POSSESSION OF THE SAID AIR PRODUCTS COMPANY AT THE TIME OF THE ALLEGED SIMPLE BURGLARY OF THE VARIETY STAG BAR, WHICH SAID BURGLARY WAS ALLEGED TO HAVE OCCURRED ON AUGUST 16, 1958.

THE SET OF TANKS THAT THE RESPONDENT REFERS TO ARE ONES THAT WERE PURCHASED BY JOSEPH CRAMER AND OTHERS ON THE 19th. AUGUST 1958 UNDER DRAY RECEIPT NO. 25570, DATED 19th. AUGUST 1958. (MARKED BY THE STATE AS S-29).

Mr. Oren Hymel, the person who sold the set of tanks to one Joseph Cramer on August 14th. and on August 19th., 1958 testified under Oath as follows:

Under Direct Examination, in Section "E" Case No. 161-524

MR. OREN HYMEL, Tr. 131

By Mr. Zibilick:

Q. Did you know Joseph Cramer?
A. No Sir, never seen him before.
Q. Could you identify him if you saw him again?
A. I think I could.
Q. Do you see him in the courtroom today?
A. No sir I don't.

Q. Show you a picture marked state 7 for identification and ask you to look at it carefully and I will ask whether Joseph Cramer is among those?

A. No Sir, Joseph Cramer is not amongst those.

PETITIONER AND JOHN H. SOLDANI were in the courtroom on trial and the photograph state 7 was a picture of one Joseph La Caze who was the person arrested with Petitioner on August 24, 1958.

LATER DURING THE TRIAL OF THIS CAUSE Mr. Oren Hymel stated the following:

Under Cross Examination, Tr. 202

MR. OREN HYMEL,

By Mr. Byrnes:

43 Mr. Oren Hymel, Under Cross Examination;
By Mr. Byrnes

Q. But neither of these two persons here is Cramer?

A. Definitely not.

Q. You saw a third man in the other car and you said he was not Cramer?

A. That's right.

Direct Examination, from the trial of this cause No. 161-524

MR. OREN HYMEL,

By Mr. Zibilich:

Q. I show you a picture here marked State 15 for identification and ask you to look at that automobile and more particularly the license number and tell me whether or not that is the same vehicle you had the tanks put in?

A. I don't remember the license number. I had written it down, but I don't remember it now, and by this picture I could not identify this car.

THE EXCERPTS AS SHOWN BY PETITIONER ABOVE TEND TO SHOW THAT THERE WAS NO CLAIM BY THIS WITNESS AS A MATTER OF FACT, BY ANY OTHER WITNESS DURING THE COURSE OF THE TRIAL THAT STATED THAT EITHER PETITIONER

OR ANY OF THE OTHERS CHARGED WITH THE CRIME EVER WENT TO THE SAID AIR PRODUCTS COMPANY ON THE DAY OF AUGUST 14, 1958, NOR WAS THERE ANY TESTIMONY DURING THE TRIAL THAT STATED THAT THE SAID SOLDANI OWNED C R EVER WENT TO THE SAID AIR PRODUCTS COMPANY ON THAT DATE.

The Respondent had claimed in their Brief on Page 3 that Petitioner had been issued a traffic summons on 14th. August, which date said auto was said by respondent to have been driven by Petitioner. Petitioner asks the Court to examine the State exhibit marked by the state as S-26 and see for itself that the date is August 20, 1958.

THE RESPONDENT STATES on Page 3 of their Brief the following:

> "... that four crowbars were noticed in the trunk of this car on August 14th. ..."

THERE WAS NO CLAIM during the course of the entire trial that the Soldani owned car was the one and same car that were seen, nor were any crowbars connected with this case ever identified or claimed to have been any of the four crowbars that were seen in an automobile at the said Air Products Company on 14th. August 1958.

MR. JOSEPH MORRIS, who was a witness for the State during the trial of this cause was the person that claimed that he had seen four crowbars in the back of an automobile that came to his company on August 14, 1958.

Direct Examination, Case No. 161-524 Section "E"
MR. JOSEPH MORRIS

By Mr. Zibilich:

44 Q. Did you load any tanks specifically in a blue 1949 Ford, you remember anything about that?
A. If automobile come there I loaded it.
Q. You load every automobile?
A. Yes.
Q. Did you see an automobile that had crowbars in the back of it?
A. Yes Sir.
Q. How many crowbars?
A. .....

By Mr. Byrnes: Page 204, I object as to his leading the witness.

EXAMINATION RESUMED BY MR. ZIBILICH:

Q. How many did you see?
A. I think it was three, no four.

Under Cross Examination *Page 204
MR. JOSEPH MORRIS,

By Mr. Byrnes:

Q. You remember this particular loading?
A. I remember loading it because was suspicious of the four crowbars, but to say what the car was I can't say.

MR. JOSEPH MORRIS was shown photographs of the Soldani car and he did not claim that it was the one and same car that he saw four crowbars in on August 14, 1958 and Mr. Morris also stated that neither Petitioner or Soldani or the picture shown to him of Joseph La Caze was ever the persons that came to the said Air Products on August 14, 1958.

The Respondent states in their Brief that:

". . . on the 20th. of August, four days after the burglary of the Variety Stagg Bar, these same tanks were returned and two new tanks were rented . . ."

PETITIONER DENIES THIS ABOVE STATEMENT BY THE RESPONDENT SINCE STATE EXHIBIT S-29 WHICH WAS A DRAY RECEIPT THAT THE POLICE OBTAINED FROM THE SAID AIR PRODUCTS COMPANY, NO. 25570 WAS DATED ON AUGUST 19, 1958, WHICH IS NOT AS THE RESPONDENT CLAIMS ON AUGUST 20th. IN THEIR BRIEF. (On Page 3)

PETITIONER WAS NOT IN THE POSSESSION OF ANY AUTOMOBILE ON THE 14th. August or on the 19th. August 1958.

TRAFFIC SUMMONS No. B-54098 was issued to Petitioner on August 20th. 1958.

PETITIONER has tried to clarify these points so that it would not appear to this Honorable Court that any auto-

mobile was in the possession of Petitioner on the dates as the Respondent alleges to this Court.

45 THE RESPONDENT just below the center of the paragraph on Page 3 of their Brief to this Honorable Court, state the following;

> "Later, on the 20th. of August, four days after the burglary of the Variety Stag Bar, these same tanks were returned and two new tanks were rented."

PETITIONER would like to point out here concerning the above statement by the Respondent the following points;

1. That the tanks that the Respondent speaks of were purchased from the said Air Products Company by one Joseph Cramer and all transactions concerning said tanks with said Company were conducted by only the said Joseph Cramer.

2. Each and every State witness that observed the various transactions of Joseph Cramer and others, all came into Court and testified that none of the persons that were on trial or charged with the said burglary were the same persons that came to their Company not only on the 14th. and 19th. of August, 1958, but that the defendants were never seen at the Company at any other time.

3. Further, there was never at any stage of the entire trial any evidence shown that the tanks that the Respondents speak of were ever used by Petitioner or by anyone else for any illegal purposes, or any evidence shown that the said rented tanks were ever used during or at the simple burglary of the said Variety Stag Bar on the 16th. of August 1958.

CONTINUING ON PAGE 3 of the Respondents Brief just following the above shown statement, the Respondent states the following;

1. "On August 26th., officers went with Linkletter to his apartment at 930 Poydras Street and later the same day, accompanied him to a place of business at 4516 Magazine Street, which place was operated by Linkletter and another."

2. "One of the crowbars with green paint on it, found at the Variety Stag Bar, along with a can of green paint found in the business place at 4516 Magazine Street, were examined at the State Crime Laboratory, along with a screwdriver found in Linkletter's home and the paint found at the business establishment was identical to that found on the screwdriver found in Linkletter's home and on the crowbar found at the Variety Stag Bar."

PETITIONER DENIES the second part of his above shown statements as shown by the Respondent on Page 3 of their Brief to this Court, the following are facts which Petitioner wishes to bring to the attention of this Honorable Court concerning the paint that was seized from the business establishment of Petitioner as the Respondent shows above; DURING THE COURSE OF THE TRIAL OF THIS CAUSE the State had tried to introduce into evidence the paint that the police had seized from the said business establishment 4516 Magazine Street which is the same paint that the Respondent speaks of as shown above in their state-
46 ment as in their Brief (P. 3) the trial Judge had rejected this seized paint as evidence as not being revelant and Petitioner had tried to bring this seized paint to the attention of the Honorable Court at St. Francisville, Louisiana on the 8th. of December 1961 at a Habeas Corpus hearing and this question concerning the seizure of said paint from said business place was brought out in the original Petition for a Writ of Habeas Corpus in the lower State Court and here (20th. Judicial District Court) the Respondent in their RESPONSE TO PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS, as filed with the said Court claimed the following concerning the seized paint from your Petitioner's business establishment; Paragraph 4

4.

"Respondent would show that no answer is required to the allegations contained in Paragraph 4 of the petition for the reason that the evidence obtained during the search referred to therein was not admitted in evidence, hence petitioner was not prejudiced thereby."

PETITIONER submits to this Honorable Court a copy of the above mentioned response of Respondent and marks it as Appendage "B" and asks the Court to examine same.

IT WOULD APPEAR to Petitioner that the Respondent is now attempting to show that Petitioner was prejudiced by the seizure of said paint that was seized from the said business establishment.

THE RESPONDENT SHOWS on the top of Page 4 of their Brief the following;

> "During the course of this investigation, it was discovered that Linkletter and his companion, on August 12, 1958, had rented the third floor of the building at 719 Common Street, which permitted easy access to the other buildings in that square. . . ."

PETITIONER DENIES THE ABOVE SHOWN STATEMENT AS MADE BY THE RESPONDENT TO THIS HONORABLE COURT. AT NO STAGE OF THE ENTIRE TRIAL DID ANY WITNESS WHATSOEVER MAKE THE CLAIM OR STATEMENT THAT PETITIONER AND HIS COMPANION HAD RENTED THE SAID 719 COMMON STREET PREMISES.

NOT A SINGLE WITNESS HAD MADE THE CLAIM THAT PETITIONER HAD RENTED THE SAID 719 COMMON STREET PREMISES, OR EVER STATED THAT PETITIONER WAS WITH THOSE THAT DID RENT THE SAID PREMISES ON THE 12th. AUGUST 1958.

MR. JOHN A. HARRIS, who was the owner of the said 719 Common Street building came into Court as a witness for the State, according to the sworn testimony of Mr. Harris, neither of those on trial were the persons that had come to him and rented the said premises, (Petitioner and John H. Soldani) were in the courtroom on trial.

47 THE RESPONDENT goes on to show at the top of Page 4 of their Brief to this Honorable Court the following;

> ". . . which permitted easy access to other buildings in that square, and, it was upon the roof of this building that the officers found the burglary equipment and tools above mentioned . . ."

PETITIONER DENIED the above statement of the Respondent that any tools had ever been found on the roof of said

building as the Respondent is now claiming in their Brief to this Honorable Court and this denial and excerpts are shown by Petitioner on Page 5 of this Brief now being filed by Petitioner and furthermore, no other witnesses whatsoever had made any such claim during the entire course of the trial or in any other Court of Law. (See Pages 4, 5, 12 and 16 of Appendage "A")

THE RESPONDENT also states as above "easy access to other buildings"

> DURING THE TRIAL, IT WAS THE THEORY OF THE STATE THAT PETITIONER AND OTHERS HAD USED THE 719 COMMON STREET BUILDING AS A BASIS OF OPERATION IN ORDER TO BURGLARIZE THE SAID VARIETY STAG BAR ON THE 16TH. OF AUGUST 1958 AND THAT PETITIONER AND OTHERS WERE ALSO PLANNING TO BURGLARIZE OTHER BUSINESS ESTABLISHMENTS WITHIN THIS SAME BLOCK.

THE RESPONDENT now seems to have applied this same theory and has submitted it to this Honorable Court in their Brief to the Court i.e., on Page 4 of their Brief.

PETITIONER HERE CONTENDS here that there was no evidence adduced during the entire course of the trial of this cause that shows that Petitioner or any of the others charged with this case at bar had ever been at the 719 Common Street building prior to August 24th. 1958, or that the 719 Common Street premises had been used by those charged with the simple burglary of 134 Carondelet Street on the night of 16th. of August 1958.

A WITNESS FOR THE STATE had testified during the course of the trial that certain police had gone into the 719 Common Street building shortly after the burglary of the Variety Stag Bar on Carondelet Street (No. 134) and at that time there was no evidence to show that that building had been used previously as a base of operation for the crime charged in the case at bar. Petitioner here asks the Court to read the following excerpts that pertains to the examination of the 719 Common Street Building as described by Petitioner.

48 Direct Examination,

POLICE MAJOR, WILLIAM J. Mc. NAMARA,
Case 161-524 * Section "E" Tr. 184-185

By Mr. Zibilich:

Q. Do you know where Gustafson and Viguirie did in fact arrest La Caze and Linkletter?

A. Yes sir, they did.

Q. Did they bring them back in your company?

A. Brought them back to 719 Common Street at my direction.

Q. Where were you?

A. On the third floor of the building 719 Common Street.

Q. How did you get in this building?

A. With a duplicate key we had made when Viguirie and Vogt visited it previously.

Another Witness For the State, Sgt. Cornelius Drumm. who was an expert Chart maker produced a chart that was made by him and the State had used this Chart as evidence against Petitioner and marked it as S-30. The purpose of the chart was to show exactly how Petitioner and others had used the 719 Common Street building as a basis of operation to conduct the said simple burglary as alleged by the State in this cause.

By The Court:
Tr. 228.

Gentlemen, both sides have agreed this gentleman is an expert in his particular field.

Cross Examination, Tr. 233 Case No. 161-524, Section "E"
SGT. CORNELIUS DRUMM,

By Mr. Byrnes:

Q. In other words to get from 719 you would have to go down to this sky-light by the end of the roof, and go to Kolb's restaurant, and you would have to go through a window at Kolb's and go over the Whitney Bank, who's roof you are not sure how high it is?

A. That is right.

ANOTHER WITNESS FOR THE STATE, Mr. C. C. Mills who identified himself as the owner of Kolb's Restaurant gave testimony at the trial of this cause concerning the alleged burglary of that place as Sgt. Drumm had claimed in the excerpts shown above, as following;

Cross Examination, Tr. 218 Case No. 161-524, Section "E"
MR. C. C. MILLS,

By Mr. Byrnes:

Q. Mr. Mills, Kolb's was never burglarized in August 1958, no one broke into Kolb's and took any money?

A. Not in August, No Sir.

49 Q. In August 1958?

A. Not in August.

THE RESPONDENT in order to substantiate their contention that;

". . . the third floor at 719 Common Street permitted easy access to other buildings in that square . . ."

as the Respondent has shown to this Honorable Court on Page 4 of their Brief, would have to show this Court the same excerpts as Petitioner now shows here.

HOWEVER, Petitioner would like to point out to this Honorable Court that the Respondent does not claim that Petitioner or the others charged had ever used the so called *"easy access to the other buildings in that square"*, such as is said in their Brief on Page 4.

ANOTHER WITNESS FOR THE STATE, Miss Dorthy Ettinger had testified in Court that she had seen three men, *in plain view*, at the rear part of the 719 Common Street building, the night was August 16, 1958, after she had seen the three men and had spoken to them, the police were called. The police came later on that night and could not find anything wrong. One point Miss Ettinger brought out during the trial was the fact that she could not indentify any of those on trial or accused of the crime as those persons that she saw on a roof the night of August 16, 1958. Petitioner here asks the Honorable Court to read excerpts of Miss Ettinger;

Direct Examination, Tr. 212, Case No. 161-524, Section "E"
MISS DORTHY ETTINGER,

By Mr. Zibilich:

A. I got up on a chair and looked out the window. I couldn't believe it was true. There were three men on the side roof. I didn't know what to do and she said in front of me to get off of it. So they came out to the edge of the roof in plain view and started pounding on some pipes to make us believe they were repairing something on the building.

For A Second Time in the Respondent's Brief to this Honorable Court they (on pages 3 and 4) point out the fact that;

". . . it was upon the roof of this building that the officers found the burglary equipment and tools above mentioned . . ."

If the Police have found any burglary equipment on any such roof top such as the Respondent points out to this Honorable Court, then your Petitioner has never been confronted with this evidence in a Court of Law or otherwise. Therefore Petitioner contends that this type of evidence has no place in the present case and is entirely out of order.

50 The Respondent, on Page 4 of their Brief go on to say as follows;

". . . It will be noted that the arrest of Linkletter and La Caze as they left the premises at 719 Common Street, was without warrant and the search of his person, at the time of his arrest, his apartment and place of business on Magazine Street, were also made without a search warrant . . ."

Petitioner Here Would Like to Point Out the Facts as Following;

1. As a result of the above described arrest of the Respondent, Petitioner was charged with four crimes involving New Orleans burglaries.

2. One of the bookings was for the said simple burglary of the crime of this cause, namely, Variety Stag Bar, 134 Carondelet Street.

3. During the described searches and seizures that the Respondent speaks of above shown, the Police had seized at least a truckload of what they termed as evidence.

4. None of the so called evidence was stolen or ever claimed to have been by anyone.

5. Petitioner had been in jail for three days and during this time the police had gone to the District Attorney with all of the articles that they had seized during their searches and seizures as the Respondent has shown this Honorable Court. The District Attorney would not accept any of the four charges that Petitioner had been booked with on August 24, 1958.

6. After 5 days detention at the police precinct, there was a new and different charge placed against your Petitioner and three others. This new charge is now more than three or four years old (No. 161-357 Section "H") and nobody has ever been called up for trial on this charge.

7. Under NOPD #59776 (New Orleans Police) this record will reflect that it was not until the date of September 12, 1958, that Petitioner was arrested for the crime of this cause.

8. The Police Officers that arrested Petitioner on September 12, 1958 were never called into Court to testify and they are unknown to Petitioner, they were other police than were called by the State as witnesses.

PETITIONER WISHES TO BRING TO THE ATTENTION OF THIS HONORABLE COURT THE FACT THAT THE RESPONDENT ONLY SPEAKS OF AN ARREST THAT HAD OCCURRED ON THE 24th. AUGUST 1958, AND THAT THERE IS NO MENTION OF ANY ARREST THAT THE POLICE MADE ON THE SEPTEMBER 12, 1958 DATE. PETITIONER AT THIS TIME SUBMITS TO THE HONORABLE COURT A LETTER FROM THE NEW ORLEANS POLICE DEPARTMENT AND MARKS THIS SAME LETTER AS APPENDAGE

"C" AND PETITIONER ASKS THE COURT TO EXAMINE SAME. PETITIONER CONTENDS THAT BOTH OF THESE MENTIONED ARRESTS WERE ILLEGAL ARRESTS.

THE RESPONDENT on Page 4 of their Brief state the following;

". . . The theory of the State was that Linkletter,
51 Soldani, La Caze and Ruth Morrison committed the crime of burglary after having conspired to burglarize several buildings located within the square and block surrounded oy St. Charles, Canal, Common and Carondelet Streets . . ."

THE STATE, in support of its contention and theory that Petitioner had conspired to burglarize several places in the square as the Respondent states as shown above, they brought into Court several witnesses to testify. Your Petitioner DENIES here that he had Conspired with anyone to burglarize any places whatsoever.

PETITIONER WOULD LIKE TO HAVE THIS HONORABLE COURT READ THE FOLLOWING EXCERPTS OF THE VARIOUS STATE WITNESSES THAT WERE BROUGHT INTO COURT DURING THE TRIAL OF THIS CAUSE IN SUPPORT OF THIS SAME CONTENTION OF THE STATE AT THE TIME OF THE TRIAL, WHICH TESTIMONY FOLLOWS;

MR. CHARLES MUMPHREY, Case No. 161-524, Section "E"

Direct Examination, Tr. 224,

By Mr. Zibilich:

Q. Did you receive during the month of August, 1958 any unusual phone calls?

A. Yes Sir, I received several unusual phone calls.

Q. What was the nature of the calls?

A. Reqresting the time we opened the store and closed it, and that act wasn't like a regular customer, most of our customers know what time we close. We have a sign posted in the store when we close.

Tr. 225-226
Cross Examination,

By Mr. Byrnes:

Q. Did you receive any calls yourself?
A. Yes, I received one more in the afternoon.
Q. What month was that?
A. That was in August.
Q. Latter part?
A. In the first part of August, I think it was around that time.
Q. That is all you know personally of your own knowledge that you received one call is that correct?
A. Yes, but like I said . . .
Q. You yourself?
A. Yes I received it.
Q. The call was for what?
A. Regarding when we opened and when we closed the store.
Q. Did you report that to the police?
A. No, I didn't report it.
Q. Didn't think it was unusual?
A. Didn't think it was unusual, thought it might be customers asking for it

52 Another Witness For the State in support of their Theory that Petitioner was conspiring to burglarize various places in the block which has been submitted to this Honorable Court in the Respondent's Brief at the lower part of Page 4, is as follows;

Under Direct Examination, Case No. 161-524, Section "E"

MR. C. C. MILLS,

By Mr. Zibilich:

Q. I want to direct your attention to the month of August, 1958 and ask you whether or not you received any unusual phone calls?
A. Yes Sir.
Q. What was . . .

By Mr. Byrnes:

Of course, we are going to object to this line of questioning unless it is linked up with either of these two defendants.

Examination Resumed By Mr. Zibilich:

Q. What was the nature of the calls?

A. A great many calls asking for different people in the building, both on the apartment number and the numbers of the restaurant which we have an extension in the apartment.

Q. Have you received any such calls since September?

A. No sir.

Q. Had you received any before August?

A. No Sir.

Cross Examination,

By Mr. Byrnes

Q. You say they asked for people, these phone calls they ask for people?

A. Yes Sir.

Q. What people?

A. Police people, sergeants and lieutenants.

Page 219.

Q. And they were asking for police people and sergeants of that kind?

A. Yes Sir.

Q. And it is generally known that Kolb's is closed on Sunday?

A. It is so advertised.

Q. You advertise it?

A. Yes Sir.

Q. So there would hardly be any police people there on Sunday.

A. There were that Sunday.

Q. When?

A. Oh, practically all day.

Q. That is all Sir.

53 THE EXCERPTS SHOWN HERE of Mr. Charles Mumphrey and that of Mr. C. C. Mills are taken from the trial Court in this case (No. 161-524) and the testimony is typical of all evidence adduced by the State in order to show that there was an conspiracy being conducted by Petitioner and others. The Respondent alleges this THEORY of the State on Page 4 of their Brief to this Honorable Court.

Petitioner takes note that the Respondent says that Soldani and Ruth Morrison were part of the so alleged conspiracy.

> PETITIONER WOULD LIKE TO POINT OUT HERE THAT DURING THE MONTH OF OCTOBER 1958 A PRELIMINARY HEARING WAS HELD CONCERNING THIS SO CALLED CONSPIRACY THAT THE RESPONDENT NOW ALLEGES BEFORE THIS COURT, THE HEARING WAS IN THE ORLEANS PARISH CRIMINAL DISTRICT COURT, IN SECTION "H" CASE NO. 161-357.
>
> DURING THE ABOVE MENTIONED HEARING IN SECTION "H" THE CONSPIRACY CHARGES WERE DROPPED OUTRIGHT AGAINST BOTH JOHN SOLDANI AND AGAINST RUTH MORRISON AND PETITIONER AND LA CAZE WERE HELD FOR TRIAL, BUT NOBODY HAS EVER BEEN CALLED UP FOR TRIAL ON THIS CASE.

JOHN SOLDANI is the same person who was later convicted with Petitioner for the crime of this cause in Section "E", Case No. 161-524.

> NONE OF THE STATE WITNESSES THAT WERE BROUGHT IN TO SHOW THAT PETITIONER HAD PLANNED TO BURGLARIZE OTHER PLACES IN THE BLOCK THAT THE RESPONDENT MENTIONS IN THEIR BRIEF HAD EVER CLAIMED THAT THEY HAD EVER SEEN PETITIONER OR THAT HE WAS CONNECTED WITH THE UNUSUAL OR SUSPICIOUS PHONE CALLS THAT THEY HAD RECEIVED DURING THE MONTH OF AUGUST 1958, AND THEY HAD NOT CLAIMED THAT PETITIONER WAS IN ANY OTHER WAY CONNECTED WITH OTHER UNUSUAL HAPPENINGS THAT HAD OCCURRED DURING THE MONTH OF AUGUST 1958.

HOWEVER, another witness for the State, one John Schwab, who gave testimony on Tr. pps. 219, 220, 221, 222, and 223, who identified himself as the acting manager of the Elk's Club located at 705 Common Street. Schwab's testimony was to the effect that SOLDANI walked up the stairs of the Elk's Club, wanted him to open up the safe

and demanded money. When Schwab told him no, Soldani left. Schwab further testified that the man had no weapon and no mask and said all he wanted was money.

The Soldani mentioned above is the same person that was tried and convicted with Petitioner at the trial of this cause, No. 161-524.

When Soldani's attorney (Sam Monk Zelden) took the present case up on appeal (No. 44,939) to the Louisiana State Supreme Court, he made the following plea before that Court;

> "The testimony of Mr. Schwab as aforestated, set forth an absolutely ridiculous statement which is impossible to believe and what has it to do with the illegal entry of the said premises 134 Carondelet Street?"

PETITIONER would like to point out the fact that there were never any criminal charges made on this alleged attempted robbery.

54 THE LOUISIANA STATE SUPREME COURT when the case now at Bar went up on appeal (Docket No. 44,939), declared that the "John Schwab" story was what they termed as part of a "TOTAL LACK OF EVIDENCE" and the State Supreme Court ordered the decision of the trial Court be reversed and the said John Soldani to be released, and shortly thereafter Soldani was released.

Petitioner CONTENDS that the three witnesses shown here by him, is the ONLY evidence that the Respondent could show to substantiate their claim as they have presented to this Honorable Court, that those charged with the crime of this cause had conspired to burglarize other business establishments within the said city block as the Respondent now alleges on Page 4 of their Brief to this Court.

Petitioner CONTENDS that the type of evidence the Respondent relies on when they present their THEORY to this Honorable Court when they allege that Petitioner and others had conspired to burglarize other business places in the city block that they mentioned in their Brief, are of suspicions, innuendoes, faint and far flung circumstances. This is what the Respondent now expects this Honorable Court to accept now as evidence against Petitioner to uphold their THEORY, i.e., that Petitioner and others had con-

spired to burglarize other buildings in the said block as alleged in their Brief to this Court.

Petitioner further CONTENDS that this sort of evidence does not now belong before this Honorable Court and Petitioner asks the Court not to be influenced by the alleged acts of conspiracy as said and mentioned by the Respondent throughout their Brief.

IN THE RESPONDENT'S Brief at the bottom of Page 4 and the top of Page 5 it is stated as following;

> "During the trial, Linkletter and Soldani, all of the evidence gathered at the scene of the burglary of the Variety Stag Bar, the evidence recovered on the roof of the third floor of the building at 719 Common Street, evidence recovered from the person of Linkletter, that recovered from his apartment at 930 Poydras Street, and that obtained at his place of business at 4516 Magazine Street, was introduced in evidence."

Petitioner would like to have the Honorable Court read the following points concerning the above shown statement by the Respondent in their Brief.

1. The evidence gathered at the scene of the burglary had never been shown to have belonged to Petitioner or belonging to any others that were charged with the crime of this cause, No. 161-524.

2. Petitioner has never at any time been confronted with any evidence that the police may have recovered from the rooftop of the said 719 Common Street Building.

55 3. The evidence recovered from Petitioner and that from his home was not stolen or contrabrand goods and this was all seized during an illegal arrest and seizure during the week of August 24, 1958 and when this evidence was presented to the District Attorney during this week, there were no charges accepted for the crime of this cause, even though the police had made such a request for the charge of this crime to the District Attorney, Petitioner was released and was later charged on the 12th. of September 1958. See Appendage "c".

4. All evidence obtained by the police, oral or material, was later declared to have been a "TOTAL LACK OF EVIDENCE" i.e., evidence seized from the said business establishment of Petitioner and the other person on trial (John Soldani) with Petitioner was ordered discharged and further, all the paint that was seized from the business est. was rejected as evidence by the trial Judge in case No. 161-524, Section "E", the trial of this cause.

DUE TO THE CIRCUMSTANCES surrounding the case at Bar, Petitioner contends that he has been denied his Constitutional rights under the 4th. and 5th. Amendments and further, has been denied Due Process of Law as expressed under the 14th. Amendment to the United States Constitution.

LAW AND ARGUMENT

THE RESPONDENT CLAIMS on Page 5 of their Brief that under;

L.S.A. Title 15:60, that ". . . under the circumstances of the present case as outlined in the statement of facts above presented, there can be no doubt of the fact that the arresting officers had reasonable cause within the meaning of L.R.S. 15:60 and probable cause within the meaning of the 4th. Amendment of the U.S. Constitution, to believe that a felony had been committed and that Victor Linkletter was a prime suspect. Hence, his arrest without a warrant was legal and valid."

IN LIGHT OF THE FOREGOING FACTS which petitioner has humbly submitted to this Honorable Court as TRUE FACTS, mostly taken from the trial and other Court excerpts, which are in answer to the MISTAKEN FACTS which the Respondent has presented to this Court concerning the case at Bar, and upon these contended mistaken facts, the Respondent now claims that the police and other State officials had reasonable cause under L.R.S. 15:60 and probable cause under the 4th. Amendment to believe that Petitioner

had committed the crime of this cause and a legal and valid arrest was made accordingly.

PETITIONER MUST REJECT the Respondent's contention that there was a legal and valid arrest in the case at Bar, and asks this Honorable Court to determine for itself, whether or not Petitioner's Constitutional rights were violated and Petitioner asks that this be done in light of all the evidence and facts pertaining to the present case.

56 THE RESPONDENT has presented to this Honorable Court as FACT, various statements, which Petitioner contends that there has never been any testimony adduced during the entire course of the case at Bar to substantiate the claims of the Respondent, as your Petitioner has shown thus far in this Brief.

The RESPONDENT must have been missinformed as to the TRUE FACTS pertaining to the present case, and Petitioner asks this Honorable Court to please give the Respondent an opportunity to look further into the present case so that they would be able to ascertain the TRUE FACTS, which Petitioner feels that when realized, that even they will not condone the actions of the persons involved.

PETITIONER CONTENDS that in light of the true facts as presented herein by petitioner, that there would be no lawful arrest and reasonable search and seizure as the Respondent claims on Page 5 and 6 of their Brief to dismiss and that Petiitoner shows FACTS in this Brief that can not be truly disputed by anyone.

THE RESPONDENT in their statement of facts to this Honorable Court has presented as FACTS, statements which are untrue almost in their entirety, and therefore Petitioner contends that Draper v. United States, 79 S. Ct. 333; and United States v. Rabinowitz, 70 S. Ct. 430; Angello v. United States, 46 S. Ct. 4 * * * as shown on Page 6 of Respondent's brief to this Honorable Court are NOT applicable as far as Petitioner's case at Bar is concerned.

THE FOURTH AMENDMENT to the Constitution does guarantee the right of the Citizen to be free against "Unreasonable Searches And Seizures", Petitioner contends that only through a illegal arrest, search and seizure was how the State of Louisiana able to mount the semblance of

a case against Petitioner and gain a conviction as they did in the case at Bar.

". . . arrests on suspicion are not Constitutional, Henry v. United States, 361 U.S. 98.

THE RESPONDENT has thus far only talked about an arrest which had occurred on August 24, 1958, and attempts to pass this illegal arrest off to this Court as the legal arrest connected with the case at Bar. As a result of this August 24th. arrest, the District Attorney had refused all charges that were connected with that arrest when first presented to him and 6 days later a new and different charge was placed against Petitioner which is now about 4 years old and nobody has been called up for trial on that charge, Case No. 161-357, in Section "H" Orleans Parish Criminal District Court. The crime of the present cause was one of the District Attorney rejected charges, i.e., simple burglary of Variety Stag Bar, 134 Carondelet Street, New Orleans Louisiana.

57 UNDER DATE OF SEPTEMBER 12, 1958, Petitioner and Ruth Morrison only, were arrested from Petitioner's business establishment located at 4516 Magazine Street, and were then taken to the first district police station and booked with the crime of this cause. See appendage "C" and refers to N. O. P. D. #59776, this arrest occurred about 19 days after the police had conducted all of the searches and seizures that the Respondent mentions in their Brief to this Honorable Court.

PETITIONER asks the Honorable Court to read the following excerpts taken from the trial of this cause No. 161-524, Section "E". The statements of this witness, who it appears from the trial Court records, had charge of the various police actions pertaining to the mentioned arrest of Petitioner on August 24, 1958. The witness here claims that the August 24th. arrest had nothing to do with the crime of this cause, i.e. as below.

On Re-Direct Examination,

MAJOR WILLIAM J. McNAMARA,

Tr. 191

By Mr. Zibilich:

Q. The other case we are talking about do you recall what court that was in?
A. Judge Bagert's Section.
Q. Was it a jury case?
A. No sir, it was not.
Q. What was the particular charge if you recall?
A. Conspiracy to burglarize Kolb's Restaurant.
Q. On what date?
A. August 24, 1958.
Q. Had nothing to do with the Variety Stag Bar?
A. No sir, we didn't tie that in into it later.

THE CONSPIRACY CHARGE mentioned above by Major McNamara was never brought to trial. The charges were dropped altogether against two of those charged, (John Soldani and Ruth Morrison) Soldani was the other person convicted with Petitioner for the crime of this cause. The above mentioned Conspiracy was not placed against Petitioner on the day of August 24, 1958, after Petitioner had remained in jail for 5 days after August 24th. had the herein mentioned conspiracy charge been placed against Petitioner and the others involved in this case.

"An officer arresting without a warrant cannot justify his action in holding or detaining a prisoner for an unreasonable time before obtaining a warrant upon the grounds that such delay was necessary in order to investigate the case and procure evidence against the accused," Motovia v. Hult, 123 N. E. 2nd. 893.

58 UNDER DATE OF AUGUST 24, 1958, Petitioner was arrested and then taken to the 1st. District Police Station and one of the charges that Petitioner was booked with was burglary of the 719 Common Street premises. MR. JOHN A. HARRIS who appeared at the police line-up the following day had told the police that there had been no

burglary of his building and that the person arrested with Petitioner had been the person that rented the said 719 Common Street building, i.e., Joseph La Caze.

Officer Lawrence Viguirie the officer that had arrested Petitioner on August 24, 1958 could not identify the things which he and other police had observed Petitioner and La Caze carry into the 719 Common Street bldg. After the police had entered this building alone without Petitioner and La Caze, they called the discovered tools and equipment burglar tools. See Page 10 and 11 of Appendage "A".

Cross Examination—Case No. 161-357, Section "H"

OFFICE LAWRENCE VIGUIRIE,

Page 10 and 11.

By Mr. Zelden:

Q. you then stated on Sunday, somewhere between 2:00 and 2:10 you saw Jake La Caze and Linkletter take some objects out of the trunk and walk into the building?

A. Yes, sir.

Q. Could you see what they carried?

A. Saw two objects wrapped in sacks, several boxes.

Q. You don't know what it was?

A. No, sir.

Q. You can identify it?

A. No sir.

The Above Shown Testimony of officer Lawrence Viguirie shows that he did not know what Petitioner and La Caze had carried into the 719 Common Street building until the police had entered the building alone and then "discovered" what was alleged by the police to have been burglar tools and equipment.

"Unlawful arrest cannot be the foundation of a lawful search, nor information obtained by an unlawful search furnish the basis for a lawful arrest; and where an arrest or search is unlawful in the beginning, it is not made lawful by what afterwards takes place." Enlow v. State, N. E. 2nd. 250.

PETITIONER CONTENDS that a search and seizure was made of his person during such a time when an unlawful arrest was being committed against him and during such time when the police were conducting an unlawful search and seizure of the premises 719 Common Street.

59 WHAT RIGHT DID THE POLICE HAVE BY TAKING IT ON THEIR OWN BY HAVING A KEY MADE AND SEARCHING THE 719 COMMON STREET BUILDING, NOT ONCE, BUT TWICE, AND WITHOUT A SEARCH WARRANT?

IN THE CASE AT BAR a witness for the State describes the search of Petitioner and the testimony as follows shows how the police had entered the said 719 Common Street Building.

Direct Examination, Case No. 161-524, Section "E"

POLICE MAJOR, WILLIAM J. McNAMARA,

Tr. 184-185.

By Mr. Zibilich:

Q. Do you know where Gustafson and Viguirie did in fact arrest La Caze and Linkletter?

A. Yes Sir, they did.

Q. Did they bring them back in your company?

A. Brought them back to 719 Common Street at my direction.

Q. Where were you?

A. On the third floor of the building 719 Common Street.

Q. How did you get in this building?

A. With a duplicate key we had made when Viguirie and Vogt visited it previously.

Q. Did you make any search of Linkletter or take anything off his person? I mean at that particular time?

A. There were some keys on a chain that were taken. I don't remember whether I took them or somebody else.

THE ABOVE MENTIONED SEIZED KEYS WERE USED AS EVIDENCE DURING THE TRIAL OF THIS CAUSE AND PETITIONER WAS PREJUDICED THEREBY.

". . . An officer making an arrest has authority to search the person of his prisoner, but a search is

justifiable only as an incident to a lawful arrest. If the arrest is unlawful the search is also unlawful." Conningham v. Baker, 104 ALA, 160 16 So. 68, 53 A.S.R. 27.

". . . Belief however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant and such searches are held unlawful not withstanding facts unquestionably showing probable cause. . . ." Angelo v. United States, 269 U. S. 20 (1925) 292, 295.

THE OFFICIAL records of the New Orleans Police Department reflect that Petitioner was not arrested with the crime of this cause until September 12, 1958, and all of the searches and seizures the Respondent states in their Brief are those searches that occured about 19 days before the September 12, arrest, See Appendage "C".

". . . It is also settled law that where the search is incidental to an arrest, the arrest, must occur before the search, and the search must be completed at the time of arrest. People v. Conway, 225 Mich. 152, 195 N.W. 679 (1923).

60 ". . . A search of the person is not lawful if its purpose is to discover grounds as yet unknown for an arrest, and in such a situation the search does not become lawful because of what is found. . . ." Johnson v. United States, 333 U. S. 10 (1948).

". . . And if a suspect, arrested without a warrant or without the existence of probable cause, is searched and articles implicating him in crime are found, they may not be used in federal court. . . ." Weeks v. United States, 232, U. S. 383.

WHEN THE ARREST AND SEARCH of Petitioner was conducted by the police on August 24, 1958, petitioner was not in the commission of any crime, the arrest occured ONLY after it became apparant that the petitioner was not going to commit any crime such as the police had suspected, and therefore the police had no grounds for a legal arrest

at that time and such being the case, the arrest and seizure of the set of keys should not become lawful.

On August 24, 1958, four charges were placed against Petitioner and others, none of these charges were accepted by the District Attorney when they were presented to him during the week of August 24th., 1958. The crime alleged of this cause was to have occured on August 16, 1958, at 134 Carondelet Street, New Orleans, which is on a different Street and at another address than 719 Common Street.

The Police Went Alone Without Petitioner on August 24, 1958 and then conducted a search of his home and seized the personal papers and belongings of Petitioner.

The Home of Petitioner was 6 to 7 city blocks from where the August 24th. arrest of Petitioner had occured.

The Police knew for a period of two days before the August 24th. arrest that Petitioner had resided at the 930 Poryras Street premises and had ample time to obtain a search warrant if they so desired.

A Witness for the State made the following remarks during the trial of this cause, and Petitioner asks the Honorable Court to read the excerpts;

POLICE MAJOR, WILLIAM J. McNAMARA,

Direct Examination,

Tr. 186-187.

By Mr. Zibilich:

> Q. What was found in your presence?
>
> A. In the apartment was taken out a pair of crepe sole shoes, a myriad of stuff came out of a drawer which according to Miss Morrison . . .
>
> Q. Don't say what she said.
>
> A. We took a lot of personal papers and a small screwdriver, a whole pillow slip came out of one of the drawers which we took out. (Petitioner's Underscore)

61 The Personal Papers That Were Seized by Police from Petitioner's home on August 24th. were used as evidence during the trial of this cause and Petitioner was prejudiced thereby.

All Property That Was Seized from the home of Petitioner was his own personal property and personal papers,

there was no stolen goods or contraband things found at the home of Petitioner, the things seized were used during the trial of this cause and Petitioner was prejudiced thereby.

THE PERSONAL PAPERS that were seized and used by the State as evidence were marked by the State as S-32, and Petitioner was prejudiced thereby.

> "... But it has been held that authority to search a house or place of business incidental to a lawful arrest is certainly not greater than that conferred by a search warrant. It follows that private papers wanted solely as evidence which could not be seized even under a search warrant issued upon ample evidence MAY NOT BE TAKEN AS INCIDENTAL TO AN ARREST ..."
>
> (Petitioner's Underscore)
> United States v. Lefkowitz, 285 U.S. 452 (1932).

THE TRIAL COURT allowed over the objection of the attorney for Petitioner, the personal property and personal papers of Petitioner to go into evidence, the personal paper used and marked by the State as S-32 was a card with writings on its reverse side which were ascribed to Petitioner by a handwriting expert who gave testimony for the State in connection with this card (Tec. Warren M. Forrest) and Petitioner did not then and does not now challenge this fact.

THE STATES broad insinuations and innuendoes and implications as it presented this (Marked S-32) card in evidence, was manifestly designed to show the jury that great evil was attached to the card, i.e., that Petitioner had listed names and addresses on the card as prospective victims of burglary. Petitioner deems this prejudicial misconduct in a flagrant degree and reversible error, per se. BUT THE SPECIFIC OBJECTION TO THIS, TAKEN NOW, IS THE INTRODUCTION OF THIS CARD INTO EVIDENCE OVER THE OBJECTION OF PETITIONER'S ATTORNEY AND PETITIONER WAS PREJUDICED THEREBY, THIS AMOUNTED TO COMPELLING PETITIONER TO TESTIFY AGAINST HIMSELF AND IN DIRECT VIOLATION OF THE 5TH. AMENDMENT TO THE UNITED STATES CONSTITUTION.

". . . but he may not seize "Merely evidentiary materials" that is, materials which are merely evidence of crime and not things in themselves illegal . . ." Harris v. United States, 331 U.S. 145, 154 (1947).

62 ". . . Use in evidence, of papers seized in a search unconstitutional under Amendment four (4), is in effect to compel defendant to to become a witness against himself. Gouled v. United States, 225, U.S. (1921), 292, 295.

". . . A search and seizure of private papers in effect compels a man to testify against himself in violation of the Fifth Amendment privilege against self-incrimination, and therefore such a search and seizure is unreasonable, and repugnant to the Fourth Amendment. Boyd v. United States, 116 U.S. 616, (1886).

". . . There is a Constitutional difference between a search for things which are themselves prohibited such as stolen good,s and a search for books and papers sought as evidence, the latter being illegal . . ." Boyd, Supra.

On or About August 25th. 1958, there was a second search and seizure conducted at the home of Petitioner (930 Poydras Street New Orleans, La.) in the presence of Petitioner, the seized things were taken over protest and were later used as evidence during the trial of this cause, (No. 161-524) The Respondent on the lower part of Page 3 of their Brief to this Court admit to this second search and seizure that was made, the part of the evidence that was seized and used during the trial was two cans of paint marked by the State as S-42 and S-43, these were used as evidence over the objection of Petitioner's attorney, and Petitioner was prejudiced thereby.

". . . It is also settled law that where the search is incidental to an arrest, the arrest, must occur before the search and the search must be completed at the time of arrest . . ." People v. Conway, 225 Mich. 152, 195 N.W. 679 (1923).

In the Case at Bar the searches and seizures were conducted about 19 Days before the arrest of Petitioner

for the crime of this cause, i.e., Simple Burglary of Variety Stag Bar, 134 Carondelet Street, New Orleans. The searches were on and about August 24th. 1958, and the arrest was on September 12, 1958. See Appendage "C".

THE RESPONDENT on Page 3 of their Brief admit that there was a search and seizure of Petitioner's business establishment at 4516 Magazine Street, on or about August 25th. 1958.

THERE WERE ACTUALLY TWO searches conducted at the said business establishment and during the first search various articles were seized and were later introduced into evidnece (Search of August 24.) during the trial of this cause, ALL OF THE MATERIAL EVIDENCE THAT THE POLICE HAD SEIZED FROM THE SAID BUSINESS ESTABLISHMENT, WAS REJECTED BY THE TRIAL JUDGE AS NOT BEING RELEVANT TO THE CASE.

63 HOWEVER, three or more of the Police that had conducted the searches and seizures of the said business establishment gave ORAL TESTIMONY AS EVIDENCE, this testimony pertained to things they had seen during the said search and Petitioner's attorney had objected to the use as such during the trial of this cause, however, the trial judge permitted their testimony to go to the jury and Petitioner was prejudiced thereby.

WHEN THE CASE OF THIS CAUSE (Docket No. 44,939 State Supreme Court) went up on appeal, the Louisiana State Supreme Court declared that all evidence given in connection with the said business establishment at 4516 Magazine Street, was a "TOTAL LACK OF EVIDENCE" and ordered the other person that was on trial and convicted with Petitioner (John Soldani) to be discharged.

HOWEVER, this same evidence was used against Petitioner before the jury over the protest of Petitioner's Attorney, and Petitioner was prejudiced thereby.

It is the contention of Petitioner that this makes the search and seizure of the 4516 Magazine Street business an unreasonable search and seizure under the 4th. Amendment.

WHAT CAN BE more unreasonable than to allow the said seized evidence from the business establishment to stand against Petitioner and at the same time to be declared as a "TOTAL LACK OF EVIDENCE AGAINST THE OTHER CONVICTED

PARTY INVOLVED"? The said Company was about 45 city blocks from the scene of the crime and in an entirely different part of the city. The oral evidence used against both Petitioner and John Soldani that was obtained by the police from the Company had NOTHING to do with the premises 134 Carondelet Street, the place of the said crime of this cause, yet it was used as evidence during the trial and Petitioner was prejudiced thereby.

PETITIONER CONTENDS THAT IT WAS UNFAIR AND AGAINST THE CONSTITUTIONAL RIGHTS OF PETITIONER TO HAVE USED SUCH A TYPE OF EVIDENCE AS PETITIONER HAS DESCRIBED HERE.

PETITIONER went into detail on this matter in his allegations starting on Page 15 in his original petition for a writ of habeas Corpus to this Honorable Court, and Petitioner urges this Court to read over paragraph IV of the said habeas corpus petition so that the subject matter may be fully understood.

64 ". . . . It is also established that the Fourteenth Amendment forbids, "Fundamental Unfairness in the use of evidence whether true or false . . ." Lisenba v. People of State of California, 314 U.S. 219, 236, 62 S. Ct. 280, 290, L. Ed. 166.

". . . Witnesses may not testify as to what they saw during an illegal search . . ." Amos v. United States, 225 U.S. 313 (1921).

DURING EACH AND EVERY SEARCH by the police they seized any and everything they could lay their hands on, hauled these things away with them, sorted through the various seized things, and only brought things into Court as evidence that could create a suspicion before the jury.

Even at the 719 Common Street building the Police did not bring into Court as evidence, the paint, paint brushes and other things such as a Manila folder, which contained plans for work to be done at the 719 Common Street building. A police officer during the trial had said that he saw this folder, but it was not among the evidence at the trial. The only things brought into Court were the suspicious things.

PART OF THE PERSONAL PAPERS that the police had seized from the dresser drawer of Petitioner at his home during the police search on August 24th, were personal letters, some of these letters were taken and shown to the Mayor of New Orleans (Mayor Morrison), and as a result of this Police action, Leonard A. Calcagno, who was then the attorney for Petitioner was more or less forced to resign from the case, this attorney then went out and hired Mr. Bentley Byrnes to defend Petitioner. Leonard A. Calcagno was also a part time City Attorney and if he had not dropped the case of Petitioner he would have been fired. He was permitted to handle other criminal cases and only had to drop the case of Petitioner.

THE SAID LETTERS THAT WERE TAKEN by the police to the Mayor were from Petitioner's 12 year old Son who was living with his Mother in California and the letters had been sent to Petitioner c/o Leonard A. Calcagno at his Law office.

> "... The goods to be seized under a search warrant must be described with such certainty that they may be identified and with such particularity that the officer charged with the execution of the warrant will be left with no descretion respecting the property ..." People v. Sovetsky, 342, Ill. 583, 588, 175 N.E. 844, 846 (1931).

65 AT THE LOWER PART OF THE RESPONDENT'S BRIEF on Page 7, it states as following;

> "... Petitioner takes the position that since the evidence was inadmissible as to Soldani, same should be inadmissible as to him ..."

PETITIONER CONTENDS that no answer is required by him as to the above shown statement on Page 7 of their Brief.

THE ISSUE the Respondent speaks of is not before this Honorable Court at this time, it has not been any part of the allegations and Contentions in the original petition for a writ of habeas corpus as filed in this Court.

PETITIONER DOES NOT ASK this Honorable Court to hear and consider this question at this time.

THE REFERENCE made in Petitioner's habeas corpus petition to this court was pertaining to the search and seizure of the said business establishment of Petitioner. Here the

jury had heard evidence against Petitioner in connection with the said Company and all of the evidence was later declared to have been a "TOTAL LACK OF EVIDENCE" when this case went up on appeal and the other person charged and convicted had been ordered discharged. THIS WAS USED as an example by Petitioner to show this Honorable Court that the search and seizure of 4516 Magazine was an unreasonable search and seizure under the Fourth Amendment.

HOW COULD THE SEARCH of said Company be declared reasonable under any reasoning, the jury did not know that they were listening to illegal evidence! Petitioner was prejudiced by the evidence used.

CHIEF JUSTICE HUGHES once explained the underlying reason for the rule when he said:

> ". . . The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the 4th. Amendment, and this together with legislation regulating the process should be liberally construed in favor of the individual . . ." Sgro v. United States, 287, U.S. 206, 210 (1932).

CONCLUSION

In conclusion, it is submitted that the arrest of Petitioner was unlawful and that there was under the circumstances, no valid arrest and that all searches and seizures conducted by the police in this case, were, "UNREASONABLE" searches and seizures.

The rights guaranteed to Petitioner by the 4th., 5th., and 14th. Amendment to the U. S. Constitution have been violated and and Petitioner has been denied "Due Process of Law", THEREFORE, Petitioner's Application for a Writ of Habeas Corpus should be granted and a hearing given as prayed for in the original petition filed in this Honorable Court.

66

Respectfully submitted,

VICTOR LINKLETTER
Victor Linkletter, *Petitioner*

Certificate of Service

(Omitted in printing)

Duly sworn to by Victor Linkletter
jurat omitted in printing

 Appendage "B" to Petitioner's Brief, etc.

NOTATION

This is an exact copy of the Response to Petitioner's Application for Writ of Habeas Corpus which was served on Petitioner in Open Court on December 8, 1961, as docketed under No. 2711.

Petitioner had requested that the correct date be made in Paragraph 1, and the Judge, after Respondent corrected the typographical error, had the Court Clerk enter the change in the minutes of the Court. The change was from date, October 24, 1958, to August 24, 1958.

TWENTIETH JUDICIAL DISTRICT COURT
PARISH OF WEST FELICIANA
STATE OF LOUISIANA

No. 2711

STATE OF LOUISIANA, EX REL VICTOR LINKLETTER

V.

VICTOR G. WALKER, WARDEN LOUISIANA STATE PENITENTIARY

Response to Application for Writ of Habeas Corpus

NOW INTO COURT comes Victor G. Walker, Warden of the Louisiana State Penitentiary, through Jack P. F. Gremillion, Attorney General of the State of Louisiana, and other undersigned counsel, who now makes written return to realtor's petition for a writ of habeas corpus. Respondent shows that the application of petitioner contains a Statement of Facts surrounding his apprehension, detention, trial and conviction, and his various complaints thereto all of which require no answer for the reason that the

record is the best evidence thereof. Further answering realtor's petition respondent states as follows, to-wit:

1.

Answering Paragraph 1 of petitioner's "Allegations and Contentions" respondent admits that petitioner was originally arrested on October 24, 1958 and booked with the crime of simple burglary at the premises at 134 Carondelet Street in the City of New Orleans on or about August 16, 1958, and that petitioner, along with a co-defendant, was subsequently convicted of said crime, but the remaining allegations in Paragraph 1 are denied.

2.

In answer to Paragraph 2 of the "Allegations and Contentions" respondent admits that police officers searched the premises mentioned therein and obtained certain evidence which was introduced at the trial of the petitioner, but respondent denies the remaining allegations contained in said Paragraph 2.

69

3.

Respondents admits that on August 25, 1958 petitioner was taken to his home at Municipal 930 Poydras Street, New Orleans, Louisiana, and that a search was conducted therein during which certain items of evidence was seized and which were later offered in evidence at the trial, but respondent denies the remaining allegations of said Paragraph.

4.

Respondent would show that no answer is required to the allegations contained in Paragraph 4 of the petition for the reason that the evidence obtained during the search referred to therein was not admitted in evidence, hence petitioner was not prejudiced thereby.

5.

Respondent would show that the allegations contained in Paragraph 5 are mere conjecture and are purely speculative and consist entirely of opinions of the applicant

and are not matters which may be heard on a writ of habeas corpus.

6.

Respondent would show that the allegations in Paragraph 6 of the petition are argumentive, speculative and are conclusions of law all of which go to the weight of the evidence and all of which are not proper matters to be raised in a writ of habeas corpus, and therefore no further answer is required.

7.

Respondent would show that the allegations in Paragraph 7 of the petition are argumentive, speculative and are conclusions of law all of which go to the weight of the evidence and all of which are not proper matters to be raised in a writ of habeas corpus, and therefore no further answer is required.

70 Further answering respondent would show that petitioner is being held by virtue of the following, to wit:

1. Certified copy of Bill of Infomation No. 161-524, filed by the Assistant District Attorney Richard McBride, Jr., in Division "E" of the Criminal District Court in the Parish of Orleans with Minute Entries thereon showing a verdict of guilty as charged, sentence and decision of the Supreme Court of the State of Louisiana affirming the conviction and sentence of applicant herein.

2. Statement of Facts dated October 24, 1960 signed by Honorable J. Bernard Cocke, Trial Judge, and Honorable Robert J. Zibilich, Assistant District Attorney for the Parish of Orleans.

Wherefore, Respondent prays that this answer be deemed good and sufficient and that after all due delays and proceedings had, there be judgment herein in favor of respondent, Victor G. Walker, Warden of the Louisiana State Penitentiary, and against petitioner, Victor Linkletter, denying the writ of habeas corpus as prayed for,

and further rejecting any and all of relator's demands, all at relator's costs.

BY ATTORNEYS:

JACK P. F. GREMILLION
Attorney General
State of Louisiana

SCALLAN E. WALSH
Assistant Attorney General

THOMAS W. McFERRIN
Special Counsel

RICHARD DOWLING
District Attorney,
Parish of Orleans

ABRAHAM I. KLEINFELDT
Assistant District Attorney
Parish of Orleans

---

71 CERTIFICATE

I hereby certify that a copy of the foregoing Response has been personally served on relator herein by handing him a copy in Open Court on this .....day of December, 1961.

THOMAS W. McFERRIN

---

72 **Appendage "A" to Petitioner's Brief, etc.**

NOTATION

This is an exact copy of the testimony of OFFICER LAWRENCE VIGUIRIE, as copied by Petitioner from the original which is now in the possession of Petitioner. This is the Officer who arrested Petitioner originally on August 24, 1958.

This is certified to be a true and correct transcript of all testimony of this Officer by PATRICIA CHAMPAGNE, the Official Court Reporter of Section "H", Criminal District Court in and for the Parish of Orleans, State of Louisiana, from a:

Preliminary hearing held on October 10, 1958, and on October 14, 1958, in the case of State of Louisiana v. Victor Linkletter, Et al, No. 161-357.

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73 OFFICER LAWRENCE VIGUIRIE, a witness for the State, having been duly sworn, testified as follows:

Direct Examination

By Mr. Hertz:

Q. What is your full name? A. Lawrence John Viguirie.

Q. Are you presently and were you on August 21st of this year employed by the New Orleans Police Department? A. Yes, sir, I was.

Q. On about that date, did you have occasion to go to the St. Charles Hotel? A. Yes, sir, I did.

Q. When did you go to the St. Charles Hotel? A. I arrived there about ten minutes to two.

Q. What day? A. On Sunday, the 24th of August.

Q. Did you go to that hotel prior to that date? A. Yes, sir, I did.

Q. When? A. Two nights in succession; that would have been Thursday and Friday. No, Friday and Saturday nights.

Q. That would be the 22nd and the 23rd? A. It would be.

Q. What were you doing at the St. Charles Hotel on those days and nights? A. We were keeping 719 Common Street under observation.

Q. 719 Common Street? A. 710 Common Street.

Q. For what purpose? A. For anybody that might have come into this location.

Q. I show you State Exhibit, marked for identification S-1. Are you able to identify the subject matter of

74 that photograph? A. Yes, sir.

Q. What is that? A. This is 719 Common Street, the entrance on Common Street to the building.

Q. Is that here in the City of New Orleans? A. Yes, it is.

Q. Is that the entrance way which you took under observation on that day? A. Yes, sir, it is.

Q. The first day that you went there, did you see any or all of these four defendants go on those premises or approach those premises? A. The first day?

Q. Yes. A. No, sir, I didn't know the four. I saw two people go there, a man and a woman.

Q. Are you able to identify by names that man and woman? A. No, sir, not positively. This was at night when I saw the man and woman and I called downstairs to Captain Stevens. I talked to Captain Stevens on the phone, told him there was a man . . . .

By Mr. Braniff: Objection. It's hearsay.

By the Court: Objection overruled.

Examination continued by Mr. Hertz:

Q. Continue. A. I called Captain Stevens downstairs, told Captain Stevens there was a man and a woman going into this location.

Q. What time of day or night was this? A. This was at night; I would say about eight or nine o'clock.

Q. What did this man and woman do? A. Well, the man put a key in the door. From our vantage point it looked like he might have tried the key or or tried the door. Then they closed the door. The woman stood with her back towards the door, looking out towards the street. Neither one of them entered the building. They looked like they just checked the door and then they walked out on Common Street towards Carondelet Street.

Q. Did you see anyone else that night go near those premises? A. Not Friday night, no sir.

Q. What about Saturday, the next day? A. No, sir.

Q. What about Sunday, August 24th? A. Yes, sir, we did.

Q. What did you see or whom did you see, if anybody? A. We saw Jake LaCaze and Vic Linkletter go to a blue car which was parked in front of the building, a Ford, and from the trunk, they took objects out of the trunk, brought it up to the building. They went into the building, closed the door behind them, stayed in there for approximately an hour and they came out. They walked on Common Street towards St. Charles Avenue.

Q. What time was this? A. I would say it was about two o'clock; in the neighborhood of 2:00, 2:10.

Q. Did you see them, later on or anyone else later on? A. Saw them when they came out of the building.

Q. Who was this you saw, now? A. Jake LaCaze and Vic Linkletter.

Q. Did you see a third man? A. Yes, sir, I did. The third man got into the automobile, into the Ford, and drove off, drove off towards Carondelet Street on Common.

Q. Are you able to identify that third man? A. Not positively, no, sir.

76 Q. What happened next, if anything? A. When LaCaze and Linkletter came out of the building, I was in Room 466 in the St. Charles Hotel with other officers and I received instructions, Paul Gustafson and myself . . .

By Mr. Braniff: We object to that as being hearsay evidence.

By the Court: Objection sustained.

Examination Resumed by Mr. Hertz:

Q. What did you do, Officer? A. We arrested LaCaze and Linkletter.

Q. What did you do next, if anything? A. Brought them back to the—in front of the St. Charles Hotel.

Q. What else happened, if anything? A. They were later brought to 719 Common Street.

Q. What else did you do? A. After we returned from 719 Common Street, Captain Stevens, Sergeant LeBlanc and myself brought them to the First District and booked them.

Q. Did you go upstairs in 719 Common Street? A. Yes, sir.

Q. Which floor? A. Well, it would have been the second floor.

Q. The second floor? A. It would have been the top floor, the third floor. The basement floor, the second, it would have been the third floor.

Q. What did you find there? A. There was an oxygen tank, an acetelene tank, extension ladder, crow bars, burning torch, three weapons; might have been other things I don't recall.

77 Q. What did you say you put in your car? A. We put the oxygen tanks, I think we put the acete-

lene, oxygen tanks, the burning equipment, we put in our car.

Q. What did you do with them after you put them in your car? A. Brought them to the Detective Bureau and put them in the property lock-up.

Q. What else did you do, if anything? A. Marked it for evidence.

Q. Who marked it? A. Myself.

Q. Will you step down and examine these various exhibits which appear here and tell me if you are able to identify any of them and if so what? A. The oxygen and acetelene cylinders I have initialed and have stickers on them.

Q. Are those the same ones you brought down and put in your car yourself? A. Yes, sir.

Q. How about this ladder and briefcase here? Are you able to identify those? A. Yes, sir, the briefcase has the date and my name on it also. Also my name and the date on the ladder.

Q. Are you sure that is the equipment that was found on those premises? A. Yes, sir.

Q. Officer, I show you State Exhibit 6. Are you able to identify the subject matter of that photograph? A. Yes, sir.

Q. What is that? A. On our return to 719 Common Street, on the uppermost floor, this is how we found the oxygen tank and the acetelene cylinder, the box containing the tools which were all secured at the time. It was back up here on this platform like, which we later
78 dusted for prints, and it contained I think a thirty-eight caliber revolver and holster.

Q. Was anything—Does that picture represent a true picture of the way things were when you saw them first, Officer Viguirie? A. As near as I can remember it does.

Q. Will you step down off the platform? Is there anything in there that you can identify. Particularly I refer you to those two boxes right directly to your rear. A. The crowbars, a couple of crowbars in there, the gages were up there.

Q. Are you able to identify the oxygen tank? A. Yes, sir, on the rear of the tanks I have scratched my initials and the date.

Q. Did you have occasion to go to 930 Poydras Street that day? A. Later, yes, sir, the same day.

Q. For what purpose? A. We met other officers there.

Q. Did you find anything there? A. Quite a number of articles taken that belonged to Victor Linkletter. At the time I don't recall all of the articles.

Q. I show you specifically some paint. Are you able to identify any of these cans? A. When you asked me about the question on the 24th, we had seen this paint here on the 24th, on a Sunday. But later I went back here on this date, on the 25th, and got these cans of paint.

Q. You saw that there on the 24th? A. Yes, sir.

Q. What else did you see there? A. There was clothing, a lot of paper; I don't recall anything other than that.

Q. Do you know who lived there? A. Vic Linkletter and Ruth Morrison stated they lived there.

Q. You stated you went back there on the 25th? A. Yes, sir, I did.

79 Q. What did you do there on the 25th? A. That's when we took this can of paint from the residence.

Q. Is that all you took from the residence? A. That's all I remember. There may have several cans of paint taken.

Q. Did you go to 4516 Magazine Street? A. We did on the 25th.

Q. Did you take anything from 4516 Magazine Street? A. Yes, sir, we took some paint from there, green paint.

Q. Will you step down and look in that middle rear box and see if you are able to find the paint you recovered from 4516 Magazine Street? A. Yes, sir, this is the one. It has the initials and the date and the location.

Q. Is this the can that you found or saw on the 24th, that you picked up on the 25th at 930 Poydras Street? A. Yes, sir, it is. There would have been two of them.

Q. That would be S-17 and S-18 and I ask that they be marked for identification purposes only. The State asks that the can of paint removed from 4516 Magazine Street be marked fo ridentification purposes only S-19.

By Mr. Byrnes: May it please the court, I don't see the purpose of marking these cans of paint. It has already been testified to that the cans of paint had nothing to do with this case whatsoever.

By the Court: What is the purpose of your interrogation on the cans of paint from 930 Poydras Street and 4516 Magazine Street?

By Mr. Hertz: To show that Linkletter and Morrison resided at 930 Poydras Street. That Soldani, Morrison and Linkletter were in a business together at 4516 Magazine Street. That a screwdriver found at 719 Common Street matches the paint found at 4516 Magazine Street and 930 Poydras Street.

80 By the Court: If he can prove that, I'm not going to preclude it.

Examination resumed by Mr. Hertz:

Q. Did you ever see the defendant, Soldani, on or near the premises 719 Common Street? A. As I stated before, I saw the third man but I don't swear it was Soldani.

Q. The State asks again did you ever see the defendant, Soldani, on or about the premises 719 Common Street? A. As I said before, I can't state it was Soldani.

Q. Did you ascertain in your role of investigator, Officer, the operator of the business at the premises 4516 Magazine Street, specifically called the Novelty Shop?

By Mr. Braniff: We object to that as being hearsay?

By the Court: Objection Overruled.

A. It was understood . . .

By Mr. Braniff: I object to that.

Examination resumed by Mr. Hertz:

Q. Do you know who operated the business, the Novelty Shop, at 4516 Magazine Street? A. From what I learned from Linkletter . . .

Q. I am asking you, Officer, do you know of your own knowledge? A. No.

Q. Very well, then, that's the answer. Did you at anytime see the defendant, Soldani, at 4516 Magazine Street? A. No.

Q. What did you do if anything, to these cans of paint? A. After getting these cans of paint and marking them, we brought them to the State lab in Baton Rouge. The State Police Laboratory. Turned them over, got a receipt for them. Later we returned and got the cans and put them in

our evidence room. Later they were entered in our evidence book and brought to the property clerk.

81 Q. What color was the car the defendants LaCaze and Linkletter and the unidentified third man got out of? A. It was a faded dark blue Ford.

Q. I show you State Exhibits 15, 14, 16 and 13. Are you able to identify that. Take a look at the photographs, Officer, before I ask you any questions. A. Sure. This is the automobile that we saw there.

Q. What color is it? A. It is a faded blue Ford.

Q. Do you recall the license number of that car as you looked down on it? A. 249-277, Louisiana '58 plates.

Q. What is the license number of that automobile in the photograph? A. 249-277, Louisiana '58.

Q. Is that the same license number? A. Yes, sir, it is.

Q. I tender the witness.

Cross Examination

By Mr. Zeldon:

Q. Officer Viguirie, you stated OO you apparently were assigned to observe the entrance of 719 Common Street from a room in the St. Charles Hotel? A. Room 466, yes, sir.

Q. Who was with you? A. The first two nights was George Vogt; on Sunday it was Gerry Hirt, Captain Stevens and myself, later joined by numerous other officers.

Q. You were there on Friday and on Saturday night? A. I was only there from 7:00 at night until about 12:00 midnight.

Q. You stated Friday night a man and a woman, who you can't identify, came and tried the door? A. Yes, sir.

82 Q. Nobody else went in or out of the place? A. No, sir.

Q. Positive? A. Not that I saw.

Q. Saturday night nobody went in or out of that place? A. No, sir.

Q. Have you been in the building 719 Common Street? A. Yes, sir.

Q. How tall is that building? How many floors? A. It's two or three floors.

Q. You don't know? A. Well, there would probably be two floors. A basement, a first floor and an uppermost floor. I would call it the second floor.

Q. Is there any business on the first floor? A. No, sir, as you go into 719 Common, it's only a staircase. You go up the stairs and there's a whole floor.

Q. What's on that floor? A. Nothing; it's a vacant building.

Q. What about the second floor? A. Nothing up there.

Q. What about the third floor? A. There's a ground floor.

Q. Nothing in the whole building? A. No, sir.

Q. It's vacant? A. Yes, sir.

Q. Is there an elevator? A. No, sir, stairs.

Q. You then stated on Sunday, somewhere between 2:00 and 2:10 you saw Jake LaCaze and Linkletter take some objects out of the trunk and walk into the building? A. Yes, sir.

83 Q. Could you see what they carried? A. Saw two objects wrapped in sacks, several boxes.

Q. You don't know what it was? A. No, sir.

Q. You can identify it? A. No, sir.

Q. You were on the fourth floor. With respect to 719 Common Street, where were you? A. Directly in front of me.

Q. You said they stayed in there an hour and came out? A. I say approximately.

Q. A third man drove off? A. The third party came to the automobile, got in the automobile and drove off.

Q. You don't know who that was? A. No, I couldn't be positive.

Q. You then got instructions to arrest them? A. When Jake and them came out of the building.

Q. Where did they go when they came out? A. They walked on Common towards St. Charles. When they hit St. Charles, they turned left and walked towards Canal Street.

Q. On the lake side of St. Charles? A. Yes, sir.

Q. Just the two of them? A. Yes, sir.

Q. You were there? A. Yes, sir.

Q. Participated in the arrest? A. Yes, sir.

Q. Alone? A. No, sir?

Q. Were they armed? A. No, sir.

Q. Did they give you any resistance? A. No.

84 Q. You then took them back to 719 Common Street? A. We took them to in front of the St. Charles Hotel; first we put them in the car. Then from the car we drove back to 719 Common Street and went up.

Q. Then you took them back out and booked them? A. Yes, sir.

Q. Did you book them? A. No, sir, Captain Stevens.

Q. What were they booked with? A. Probably 107, investigation of burglary of Kolb's Restaurant.

Q. Stevens booked them. Is that what you just said? A. I think it was Captain Stevens. Captain Stevens would have been the senior officer and I think that's how they were booked.

Q. You booked at that time just the two of them, LaCaze and Linkletter? A. Yes, sir.

Q. You said that S-6 represents to the best of your recollection a true picture of what was on that platform when you walked in with the other arresting officers, is that correct? A. I would say this is just about it. If I'm not mistaken this box may have been moved. When I got there, after we called for a photographer, the photographer took these pictures, after taking the pictures, the Bureau of Identification went all over for evidence of fingerprints.

Q. Did they find any ? A. Not that I know of. As he got through with this stuff, I carried the tanks and put them on the side.

Q. Is that the way the tanks appeared? A. Yes, sir, wrapped up in burlap.

Q. Is this paint here the paint that you are talking about? Is that the same paint? A. I didn't take any paint. This paint was in 719 Common. The paint I took was out of Linkletter's house.

85 Q. What happend to this paint? A. Probably still there. I say probably, I don't know,

Q. Was any green paint here? A. Not to my recollection. I saw red paint.

Q. Look at everyone of these cans of paint. Did you see what color they were? A. Not every one; only one I saw was red.

Q. Could you testify under oath there wasn't any green paint there? A. I went through these and I don't recall seeing any green paint, no sir.

Q. You identified the various articles that you saw and I think you said that you marked a lot of them, is that right? A. Yes, sir. I did.

Q. Can you identify this or have you up to this time? A. No.

Q. Ever see that before? A. Yes, sir.

Q. Did you take it? A. No, sir, I didn't. I didn't handle all of the evidence. I had instructions to take the crowbars, burning equipment.

Q. Did you handle the crowbars? A. Yes, sir.

Q. Took those? A. Yes, sir, I did.

Q. Tell me where you marked it? A. Yes, sir, it's initialed L.V., Lawrence Viguirie.

Q. How did you identify the containers? A. On the back of the tank is L.J.V. with the dates on them.

Q. Did you mark this for identification, referring to a screwdriver? A. No, sir.

Q. Ever see that before? A. I saw it, yes, sir.

86 Q. Ever see it at 719 Common Street? A. It came from 719 Common Street.

Q. Where? A. In one of the boxes or in Major McNamara's hands, I don't remember.

Q. At 719 Common Street or on Poydras Street? A. I think I saw it at Poydras Street, I believe. Unless I have any mark on it, I'm not going to say positively.

Q. To your knowledge no prints were recovered? A. I don't think there were any prints at all, sir. There was some more evidence that I don't see there. There were four pairs of gloves. I don't see the gloves there.

Q. Were you there when they brought Linkletter and LaCaze back from being arrested on St. Charles near Canal Street? You participated in the arrest personally? A. Yes, sir Paul Gustafson and myself.

Q. After you arrested them, you brought them to the St. Charles Hotel. Your car was there? A. Yes, sir, by the St. Charles.

Q. Then you drove to 719 Common Street. How far a distance was that? A. Only about a half a block.

Q. You took them out of the car and walked up to 719 Common? A. I left them in the automobile there.

Q. What did you do? A. I went back to Room 466. While I was going to Room 466, I met the other officers coming down.

Q. Where were the two prisonrs? A. In the car with Paul Gustafson and another officer.

Q. When you originally went to 719 Common Street, were you there? A. I went with them.

Q. Who opened the door? A. At 719 Common? I don't know. The door was open when we got there.

87 Q. Do you know who opened it? A. No, sir.

Q. Then you went upstairs with the prisoners, is that right? A. Yes, sir.

Q. And all this paraphernalia was on this platform as portrayed in this photograph? A. Yes, sir.

Q. Now, all of this equipment was taken by the officers and taken back to the Detective's office here in the building, is that right? A. I imagine it would have been, yes, sir.

Q. What did you take? A. The burning equipment.

Q. The burning equipment. The tanks, acetelene and so forth? A. The stuff I have initialed, yes, sir.

Q. You didn't take this? A. The brief case? I was up there when the briefcase was found. May I see that picture, sir? When it was found it was right over here near. We didn't touch any of the equipment. Captain Becker opened this briefcase and we found three guns, no, two guns in the briefcase.

Q. All in the briefcase? A. No, one was in a brown paper bag. After it was dusted, I think John, Detective John Meredith, and myself handled the briefcase, the guns and like I said, the burning equipment.

Q. These guns were in the briefcase? A. Those two and a .38 revolver and a holster was in the brown paper bag.

Q. Where was it found ? A. Up here in this vicinity.

Q. Who carried the ladders back to headquarters. A. I don't recall. I think John Meredith and I carried the guns and the burning equipment.

Q. As to this other material, you have no knowl-

88 edge as to how it got there? A. I don't recall that, no, sir.

Q. That was the extent of your participation in this whole matter, just what you testified to? A. Well, until the car was located, the blue Ford was located several days later, we went over the car, dusted it, took photographs of it and scrappings off of the bumper of the automobile.

Q. And what did you find, if anything? A. Took photographs of the back of the Ford, found there was yellow markings on the back of the trunk, took colored photographs of the markings, also found yellow paint in the back of the trunk of the car that was also brought to the State Laboratory.

Q. Yellow paint. I have no further questions.

Cross Examination by Mr. Byrnes:

Q. How long did it take you from the time you arrested Linkletter and LaCaze to the time that you brought them to 719 Common Street? A. Mr. Byrnes, I would have to guess it. It was on a Sunday; it was raining. We had to call for a photographer. The photographer was out on a job. Possibly for two hours.

Q. Two hours? A. I'm guessing; I can't say exactly what time.

Q. How long had it been raining? A. All morning.

Q. And this occurred around what time? A. You say this occurred . . .

Q. When you saw them leaving the place and made the arrest. A. I would say 3:00 or 3:30.

Q. Was it still raining? A. Drizzling, Yes, sir, I remember I had a rain coat on.

Q. It had been raining all that day? A. Yes, sir.

89 Q. Where was the arrest made? A. Right on the corner of St. Charles and Canal Street by Stover's Candy Store.

Q. That's the uptown lake corner? A. Yes, sir.

Q. And then you brought them to your squad car? A. It wasn't my squad car; brought them to a squad car.

Q. Who was in the car? A. I don't think there was anyone in the squad car. We had men stashed all around the neighborhood and it was the closest one.

Q. Who stayed with them? A. Paul Gustafson stayed with them and like I said, when we hit the corner there was officers all over the place.

Q. You went in and made phone calls? A. Only thing I called for was the photographer. I knew we would need the photographer. By the time I called, most of the fellows already headed over to 719 Common.

Q. From the time you made the arrest, put them in the car and made this call and brought them to 719 Common Street, it was approximately two hours, as a guess? A. Yes, sir.

Q. Officer, getting back to the screwdriver, you said there was no markings on there at all? A. I don't see any, no, sir.

Q. There is no identification tag as to where that particular screwdriver was found, is that correct? A. There's markings on here. This is initialed, if you can see it.

Q. What's that initial? A. It's probably John Becker. No, it looks to be K.B. to me, sir.

Q. Do you know whether or not that is police identification? A. We have no specific way of marking, sir.

Q. You don't know of your personal knowledge where that was found, do you? A. No, sir.

Q. As far as you are concerned, it could have been at 930 Poydras Street, it could have been at Magazine Street or it could have been in this place on Common Street? A. Yes, sir.

Q. Now, when you saw the two men going into 719 Common Street on the 24th of August, did they have gloves on? A. No, sir.

Q. No gloves? A. No.

Q. That's all I have.

Cross Examination by Mr. Braniff:

Q. Officer, how did you determine that was green paint in one can and red paint in another? A. How did I tell it was green paint in one can and red in another?

Q. Yes. A. I think it's all green paint that I got. I didn't get any red paint.

Q. Did you use that screwdriver to open the can? A. No, sir.

Q. Well, how did you know it was green paint? A. Just from the outside of the can. At no time did I open that paint. We had enough paint on the outside to run the tests that we needed.

Q. You did testify that you had one can of red paint. A. I think the question came up, Mr. Zeldon asked me about the paint in this particular photograph here, S-6. There is any number of cans of paint up there and he asked whether there was any green paint up there. I went over most of that paint and the only paint I recall, I remember a technicolor red and several other colors of red and green. We even looked for green paint up there.

By Mr. Zeldon:

Q. Why did you look for green paint later if you
91 didn't look for it at the time you picked them up?
A. Something came up later in our investigation.
Q. In this investigation? A. No, sir.
Q. The green paint has nothing to do with this investigation at all? A. To my knowledge, I would say no.
Q. What is that screwdriver doing here? A. I don't know.

Re-Direct Examination

By Mr. Hertz:

Q. When you said that third floor was vacant, what do you mean?
Do you mean that none of this stuff was up there? A. When I said it was vacant I meant there was no furnishings in there.
Q. You testified you don't know whether that screwdriver was there or not? A. I don't recall.
Q. Did you submit the scrappings from these paint cans which you acquired at the Novelty Shop and 930 Poydras Street for some tests? A. Yes, sir.
Q. Did you get a report back? A. Yes, sir.
Q. Do you have it with you? A. No, sir.
Q. Do you know where it is? A. I think Major McNamara would have it.
Q. Do you know what that report disclosed?
By Mr. Zeldon: We object. It's hearsay evidence.

By Mr. Hertz:

Q. How about the report of the scrappings of yellow paint from the trunk of the car. Was that submitted
92 likewise? A. Yes, sir, it was.

Q. Were you present when this photograph was taken? A. Yes, sir, I was.

Q. Was anything touched on that scene before it was photographed, to your knowledge? A. Not to my knowledge. It was dusted for fingerprints and nobody went into the automobile or touched it.

Q. That is a picture of the car you saw downstairs? A. Yes, sir.

Q. If your Honor please, in connection with the testimony of this witness, the State would like to offer and introduce in evidence the ladders and ask that it be marked S-19; the briefcase containing two revolvers and ask that it be marked S-21, the yellow acetelene or oxygen tank and ask that it be offered as S-22, the cutting equipment and crowbars wrapped in burlap and ask that it be marked S-24, the gages and hoses and ask that it be marked S-25, a paper sack containing a revolver and cartridges and holster and ask that it be marked S-26.

Officer, I show you some gloves, are you able to identify these? A. On the box here is the date and my initials.

Q. Where did you first see these? A. That was at 719, upstairs.

Q. I ask that this be marked S-26 and ask that it be offered and introduced into evidence at this time.

By Mr. Zeldon: If the Court pleases, we are going to make a general objection to the admission of all of these documents or material or whatever the case may be on the specific ground that first they haven't proved the ownership of any of these things insofar as any of the defendants are concerned. They haven't proved that they were in the possession of any of the defendants. They have even attempted to introduce testimony here about articles that didn't come from 719 Common Street. We definitely object on those grounds.

93 By the Court: Objection overruled; I will admit it in evidence.

Examination Resumed

By Mr. Hertz:

Q. Officer, did you check the ownership of any of the pistols or registration of any of the pistols which were recovered? A. Yes, I did.

Q. Which one? A. On all three.

Q. Did you ascertain the registration or ownership? A. I sent telegrams to the Colt Firearm Company and the Smith and Wesson Firearm Company and through some ten to fifteen telegrams . . .

By Mr. Zeldon: I object to anything he found unless he can produce better evidence.

By the Court: I don't think that this witness can say he sent a telegram to the Colt Firearm Company and in response to his telegram he got so and so. I say this is hearsay evidence.

Examination Resumed

By Mr. Hertz:

Q. Officer, will you just answer my questions and then we will decide whether or not you should elaborate further. Did you find out to whom, if anyone, either or all of these three revolvers belonged to or was registered to?

By Mr. Zeldon: I object. It will be hearsay testimony.

By the Court: Objection overruled at this particular time. I instruct you to answer the questions yes or no.

A. Yes, sir, I did.

Examination Resumed

By Mr. Hertz:

Q. To whom is any or all of these revolvers registered?

By Mr. Zeldon: I object again. From his previous testimony the only way he could have ascertained that is by hearsay testimony.

By Mr. Hertz: I withdraw the question. To
94 whom were each or all of the revolvers registered.

By Mr. Braniff: We object on the ground that they didn't lay the proper predicate.

By Mr. Hertz:

Q. How did you ascertain the ownership or registration of the revolvers? A. I went to the Bureau of Identification myself, in the gun shop. I got a certified—no, I took a certified copy and I also got the original copy of the gun permit issued to Jake LaCaze to purchase this particular gun.

Q. Which particular gun? A. The .38 Colt.
Q. Will you step down and find the .38 Colt for me?
By Mr. Shea: We object on the same grounds as before if this is the only way he can show ownership.

By Mr. Hertz:

Q. Did you procure the original document of registration of this gun?
By Mr. Shea: Same objection, Your Honor.
By Mr. Zeldon: He is testifying to an objection taken your Honor.
By Mr. Braniff: They haven't laid the predicate yet.
By the Court: Objection sustained.

By Mr. Hertz:

Q. Did you question any of these men as to the ownership of that particular gun? A. I did.
Q. Did they inform you as to who owned the gun? A. No, they didn't.
95 Q. They did not? A. They denied ownership of the guns.

By Mr. Zeldon:

Q. Or knowledge thereof? A. Yes, sir.
By Mr. Hertz: I have no further questions,
By Mr. Zeldon: No questions, if the Court pleases.

* * * * * * * * * *

CERTIFICATION

I, PATRICIA CHAMPAGNE, Official Court Reporter of Section "H", Criminal District Court in and for the Parish of Orleans, State of Louisiana, do hereby certify that as such reporter I reported in shorthand the testimony adduced and proceedings had on the preliminary hearing held on October 10th, 1958, and on October 14th, 1958, in the case of the State of Louisiana verses Victor Linkletter, Et al, No. 161-357, and that the foregoing transcript consisting of pages one (1) through twenty-four (24) inclusive, contain a full, true and correct transcript of all of the testimony of the State witness Lawrence Viguirie.

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* * * * * * * * * * *

The following is a list of all of the State witnesses, duly sworn, who testified at the preliminary hearing in the case of State of Louisiana vs. Victor Linkletter, Et al, No. 161-357, on October 10th, 1958, and on October 14th, 1958:

John A. Harris
Major William McNamara
Oren Hymel
Detective John Meredith
Officer Ralph Fink
Charles Brecka
Eugene Tanguis
Officer Gerald Hirt
Officer Lawrence Viguirie
Officer Louis Fernandez

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96 **Appendage "C" to Petitioner's Brief, etc.**

DEPARTMENT OF POLICE
2700 TULANE AVENUE
NEW ORLEANS, LA.

Dear :

The records of this department reflect the following information:

Name Victor Linkletter Race W Sex M Date of Birth 9-21-20
NOPD# 59776 Date of Arrest 9-12-58
Charge: RS 14:62 relative to Simple burglary of 134 Carondelet St.

For: Joseph I. Giarrusso, Superintendent
Superintendent of Police
By: THOMAS G. GREGCON
Commanding Officer
Bureau of Identification

97 (Do Not Detach)

Inmate's Name Victor Linkletter No. 53289 Quarters Pine-3

LETTER—Regular (2 each week) ———— Writing to: 1st District Police Station Special Purpose X Relationship: Business

Please pay postage from my account . . .

. . . . . .

CORRESPONDENCE REGULATIONS—LOUISIANA STATE PENITENTIARY

RULES:

1. All letters must be legible and in English (unless permission is obtained for correspondence in foreign language.)

2. Do not send packages without referring to mailing list to determine what items inmate may receive.

3. Letters must be addressed to inmate correctly. Giving his name (name he is using in prison), P.M.B. and living quarters, if known.

Example:

John Doe
P.M.B. 70482—Pine 4
Angola, Louisiana

4. Cash money should not be enclosed in letter, only check or money order should be sent.

Inmate's Name Victor Linkletter PMB No. 53289 Quarters Pine-3 Date 1/23/62

Precinct Captain
1st District Police Station
North Rampart and St. Louis Sts.
New Orleans, Louisiana

Dear Sir:

I had recently filed writs in the Louisiana Supreme Court and the Court requested that I obtain supporting documents in connection with the writs.

In accordance, I hereby apply for a certified copy of the booking, showing the offense with which I was charged as entered on your book on the following dates:

August 24, 1958 and, on or about,
September 18, 1958.

I understand under Louisiana Law (acts 1928, No. 20 Sec. 2.) and R.S. 15:640, that I may request the copy as asked for.

I am pursuing this action under the Pauper's Oath and would appreciate your sending me this certified copy without cost.

Sincerely yours,

VICTOR LINKLETTER
Victor Linkletter
53289 Pine-3
Angola, Louisiana

(Use Both Sides of Paper. Do Not Write Between Lines.)

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98 CORRESPONDENCE REGULATIONS—LOUISIANA STATE PENITENTIARY

RULES:

1. All letters must be legible and in English (unless permission is obtained for correspondence in foreign Language.)

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Example:
John Doe
P.M.B. 70482—Pine 4
Angola, Louisiana

4. Cash money should not be enclosed in letter, only check or money order should be sent.

Inmate's Name Victor Linkletter PMB No. 53289 Quarters Pine 3 Date 10/24/62

United States District Court
Eastern District of Louisiana
Clerk's office
Baton Rouge 1, La.

Re. No. Miss. 648 State of Louisiana, ex rel Victor Linkletter

Honorable Sir:

In October 23, 1962, I rec'd. a copy of a Brief of Respondents On Motion to Dismiss.

I would like to also file a Brief in support of the Petition for a Writ of Habeas Corpus which is already filed with this Honorable Court. My reason for this request is that I have new evidence to submit to the Court which would show that the facts as presented by the respondents are mistaken facts and therefore I make this request. I would like to know how much time I would have to file such a Brief and request that I have at least 3 weeks to make up my Brief. Will you kindly advise me if this request is in order so that I may submit a Brief. Also, I would like to know if the Honorable Judge has appointed an attorney in my case.

Sincerely yours,

VICTOR LINKLETTER
53289 Pine 3
Angola, Louisiana

P.S. This request is made in good faith.

(Use Both Sides of Paper. Do Not Write Between Lines.)

99 IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

No. 648—Miscellaneous

WEST, J.

STATE OF LOUISIANA, EX REL, VICTOR LINKLETTER, *Petitioner*

versus

VICTOR G. WALKER, *Warden*, Louisiana State Penitentiary, Angola, Louisiana, and THE STATE OF LOUISIANA
Defendants

Minute Entry of Order Granting Motion to Dismiss and Denying Application for Writ of Habeas Corpus—November 13, 1962

This matter came on for hearing on a former day on an order directed to respondents to show cause why a writ of habeas corpus should not issue as requested by petitioner, at which time respondents filed a motion to dismiss. Pursuant to order of Court, a copy of the transcript of the record of the original trial court was filed herein, together with a brief filed by respondents. Thereafter, a brief was filed herein by petitioner, after which the Court took time to consider.

Now, after thorough deliberation, and after considering the entire record of the original trial court proceedings, and the briefs filed herein by the respective parties:

IT IS ORDERED that the motion to dismiss filed by respondents be, and it is hereby GRANTED, and the petitioner's application for the issuance of a writ of habeas corpus be, and it is hereby DENIED.

REASONS

A thorough study of the record of the proceedings in the original trial court in this matter leads the Court
100 to the inescapable conclusion that the arresting officers had reasonable cause for arrest within the meaning of Louisiana Revised Statutes 15:60, and probable cause within the meaning of the Fourth Amendment of the United States Constitution. The record clearly in-

dicates that these officers had reasonable cause and probable cause to believe that petitioner had committed a felony, and hence, his arrest, without a warrant, was lawful. LSA Title 15:60; United States v. Lindsly, 7 F. 2d 247; McBride v. United States, 284 F. 416; O'Malley v. Whitaker, et al, 43 So. 545; Barfield v. Marron, 62 So. 2d 276; Johnson v. Hodges, 65 So. 2d 812; Carroll v. United States, 45 S. Ct. 280; Brinegar v. United States, 69 S. Ct. 1302.

As to the validity of the ensuing search and seizure, resulting in the procurement of evidence used at the trial of the case, there can be no doubt. Where the arrest is lawful, subsequent search and seizure incident to the arrest is likewise valid. Draper v. United States, 79 S. Ct. 233; United States v. Rabinowitz, 70 S. Ct. 430; Agnello v. United States, 46 S. Ct. 4. Since the holding in Mapp v. Ohio, 81 S. Ct. 1684, in no way changed these well established rules pertaining to the reasonableness of searches and seizures, that case has no application in the present situation. The remaining contentions of petitioner direct themselves solely to the question of his guilt or innocence, with which questions this Court may not concern itself in a habeas corpus proceeding. Voigt v. Webb, 47 F. Supp. 743; Evans v. Rives, 126 F. 2d 633; Jordan v. Clemmer, 80 F. Supp. 539.

E.S.W.

101 IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

No. 648 Miscellaneous

UNITED STATES, EX REL., VICTOR LINKLETTER, *Petitioner*,

v.

VICTOR G. WALKER, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA, and THE STATE OF LOUISIANA, *Defendants*.

Motion for Leave to Prosecute Appeal in Forma Pauperis and Order Allowing—November 27, 1962

(Omitted in printing)

(File endorsement omitted)

103 IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

No. 648 Miscellaneous

UNITED STATES, EX REL., VICTOR LINKLETTER, *Petitioner*,

v.

VICTOR G. WALKER, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA, and THE STATE OF LOUISIANA, *Defendants*.

Notice of Appeal to Circuit Court of Appeals Under Rule 73 (b)—Filed November 27, 1962

Notice is hereby given that Victor Linkletter, Petitioner above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order of the United States District Court, Eastern District of Louisiana, Baton Rouge Division, denying a Writ of Habeas Corpus to Petitioner in No. 648 Miscellaneous, on November 13, 1962, holding that Petitioner failed to state a cause of action justifying the relief prayed.

This appeal is taken pursuant to 28 U.S. C.S. 1253 and U.S.C.A. 1915, and pursuant to Rule 75 (a), (b), (d), (f), (g), (h), (i), (m), (n) and (o), of the Federal Rules of Civil Procedure.

The following portion of the record is listed for transmission to the Clerk of Court, Fifth Circuit Court of Appeals.

1. Original Petition for a Writ of Habeas Corpus filed under docket No. 648 Miscellaneous.

2. Respondent's Motion and brief to support motion to dismiss Petitioner's application for Habeas Corpus.

3. Brief filed by Petitioner in support of Habeas Corpus application, including appendages (a), (b) and (c) attached thereto.

4. Transcript, or all Minute Entries held in this cause.

5. Findings and Judgment of Federal District Court.

6. Transcript of the record of the original trial court, case No. 161-524, Orleans Parish Criminal District Court, Section "E".

The following questions are to be presented by this appeal:

I

Petitioner avers that the judgment of the Honorable United States District Court, in granting the motion to dismiss petitioner's application for the issuance of a writ of habeas corpus is erroneous and that he has been aggrieved thereby.

104 In denying the relief requested by petitioner, this Honorable Court felt that the arresting officers had reasonable cause for arrest wtihin the meaning of Louisiana Revised Statutes 15:60, and probable cause within the meaning of the Fourth Amendment of the U. S. Constitution to believe that petitioner had committed a felony and that his arrest without warrant was lawful, and that a thorough study of the record of the proceedings in the original trial court in this matter led the Honorable Court

to reach the conclusion that the arrest of petitioner was legal as aforestated. Petitioner avers that this ruling of the Court with reference to the arrest of petitioner is particularly erroneous and contrary to the laws of this State and contrary to the Federal Constitutional Rights of Petitioner under due Process of Law, for the following reasons, to wit:

(a) The record of the trial Court which this Court made a study of was inadequate to show that petitioner was illegally arrested and it does not show clearly what had happened during the arrest of petitioner.

(b) The facts petitioner relied on to show that his arrest was illegal were clearly and fully set forth in his original petition for habeas corpus writ and further in his brief in support of his petition and the appendages attached thereto, i.e., appendage "A" and "C".

(c) In both petitioner's habeas corpus application and brief, the fact was brought out that petitioner had not been arrested for the crime of this cause until September 12, 1958 and that the records of the trial Court show that it was August 24, 1958, that petitioner was arrested, on or about which date all various searches and seizures were conducted by the police in this case.

(d) Along with the brief that petitioner had filed in support of his habas corpus application was appendage "C," which was an original letter that was mailed to petitioner from the New Orleans Police Department and this letter reflects that the correct date of arrest for the crime of this cause was September 12, 1958 and this is under N.O.P.D. No. 59776. This arrest was 19 days after the searches and seizures had taken place.

(e) There was no argument heard on the Federal Constitutional issue pertaining the alleged illegal arrest of petitioner, which he had supported by evidence from former Court proceedings (appendage "A") trial Court excerpts from the original trial court (Case No. 161-524, Section "E") and appendage "A" as

attached to petitioner's brief in support of his habeas corpus petition. Petitioner understands that (28 U. S. C. A., S. 2247) makes liberal provision for the use of records of former proceedings in evidence.

(f) Petitioner was deprived of a fair opportunity to establish his allegations pertaining to his contended illegal arrest. Petitioner deems that a hearing with witnesses in his presence was necessary in order to review the question of whether or not the arrest of Petitioner was legal and this was not done in the present case.

II

Petitioner avers that the court was in error by accepting an erroneous brief from the respondent's attorney of the record, and that by the court being confronted with such a document and by using such in adjudicating the merits of petitioner's application for a writ of habeas corpus, had deprived petitioner of a fair review concerning the actual circumstances surrounding the entire case at bar.

Petitioner had filed a brief in support of his habeas corpus application, in which the court was given certain evidence, such as portions of the original trial court excerpts and excerpts from other court proceedings etc., which petitioner deemed relevant to show that the brief of
105 the respondent had contained an erroneous "statement of facts", almost completely baseless, which contained fictitious factual allegations, which pertained to the arrest of petitioner. Petitioner had asked the Federal District Court to give the attorney for the respondent an opportunity to present a new brief as the facts in their brief were not true. The alleged facts in the respondent's brief give a false picture of the actual arrest of petitioner, if witnesses were to testify under oath, the true facts would be revealed, which petitioner contends would show that his arrest and all searches and seizures in this case were illegal.

Further, petitioner would show that the signature inscribed on the brief of respondent to dismiss petitioner's action is not the signature of the Louisiana Attorney General as the brief so indicates.

III

Petitioner avers the court was in error by not appointing counsel as he had originally requested. The appointment of counsel would have ensured fundamental fairness and given petitioner an opportunity to prove his allegations and since petitioner was not appointed counsel, it is deemed that he was deprived of a fair adjudication on his federal questions as contained in the original habeas corpus application filed in the federal court.

IV

Petitioner avers that the court was in error by assuming that the subsequent searches and seizures incident to the arrest for the crime of this cause was likewise valid. Petitioner contends that the said subsequent searches and seizures that the respondent speaks of, have never existed.

All searches and seizures had been conducted by the police about 19 days before his arrest for the crime of this cause. In support of these contentions, Petitioner submitted in his Habeas Corpus petition and brief, undisputed facts, which if examined, would show that there were *no frivolous* claims submitted to the court by petitioner.

The indisputable facts shown below exhibit a clear violation of the constitutional rights of Petitioner regarding "unreasonable" searches and seizures in violation of the 4th, 5th and 14th Amendments to the U. S. Constitution, which were all brought out in the allegations of the original petition filed in the Federal District Court and in a brief filed later in support of the habeas corpus petition.

1. Petitioner was not in the commission of any crime when arrested for the crime of this cause on September 12, 1958, or in the commission of any crime at the time of any other arrest concerning this case.

2. The searches and seizures were not incidental to a valid arrest in the instant case. The searches and seizures occurred August 24 and 25, 1958 and the arrest for the crime of this cause was on September 12, 1958.

3. The search of petitioner's person was on August 24, 1958, without arrest or search warrant and a set of

keys were seized and later used as evidence during the trial of this cause.

4. There were no stolen or contraband things seized by police during the entire case, or ever claimed to have been by anyone.

5. The officers had ample time and opportunity to obtain a search warrant for the several searches conducted by the police in this case, but did not do so.

6. In the instant case the several searches and seizures were not general, but instead, were exploratory for whatever might be turned up.

106 7. After five days detention in jail without warrant, starting August 24, 1958, the District Attorney would not accept the charge of this cause against petitioner as requested by the police. At this time the police had in their possession all things seized in the several searches and seizures, and it was later, on September 12, 1958 that petitioner was arrested and charged.

8. The trial record excerpts in the instant case would show that there was only money stolen in the amount of approximately $1,500.00 during a burglary. The several searches and seizures involved in this case failed to produce any stolen money. All money the police had seized from the person of petitioner and from his home had been returned to him during the week of August 24, 1958.

9. During the search of Petitioner's home on August 24 and 25, 1958, there were only personal papers and other personal things seized and were later used as evidence during the trial of this cause.

10. During the search of petitioner's business establishment, evidence was seized and oral testimony was given during the trial of this cause against petitioner and later on appeal, The Supreme Court of Louisiana rules that all evidence secured in connection with Petitioner's business establishment was a "Total lack of Evidence" and ordered the other person connected with petitioner to be discharged.

11. All searches and seizures in the instant case extended beyond the actual place of arrest, i.e., on the corner of St. Charles and Canal Street, New Orleans, Louisiana.

12. The officers conducting the search of the said business establishment read the company books without a physical seizure and used contents as oral evidence during trial of instant case.

13. The mode of obtaining evidence by police was unethical and a misdemeanor under the law of Louisiana.

14. The police seized and used as evidence, certain private papers valuable for evidential purposes only, i.e., from home of petitioner.

V

Petitioner avers that the court was in error by holding that Mapp v. Ohio, 81 S. Ct. 1684, "has no application in the present situation," since petitioner had accepted the burden and gathered together and submitted uncontradicted evidentiary facts which were all taken from official state records upon which petitioner based his allegations of denial of his constitutional rights, and the facts shown by petitioner were substantial and were never disputed by anyone, which facts petitioner deems show that his arrest was illegal and without reasonable or probable cause and all searches and seizures in the instant case were "unreasonable" searches and seizures in violation of the 4th, 5th and 14th Amendments to the United States Constitution.

VI

This appeal is filed in good faith and is true and correct to the best of petitioner's knowledge, information and belief.

Respectfully submitted,

/s/ VICTER LINKLETTER, *Petitioner*

107 VII

CERTIFICATE OF SERVICE

(Omitted in printing)

* * * * * * * * * * * *

Angola, Louisiana, November 19, 1962.

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109 (Clerk's Certificate to foregoing transcript omitted in printing.)

(File endorsement omitted)

110 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20235

UNITED STATES, EX REL, VICTOR LINKLETTER, *Appellant*,

v.

VICTOR G. WALKER, Warden, Louisiana State Penitentiary, Angola, Louisiana and THE STATE OF LOUISIANA, *Appellee*.

Appeal from the United States District Court for the Eastern District of Louisiana.

Order Denying Motion for Appointment of Counsel—Filed January 14, 1963

Before HUTCHESON, BROWN and WISDOM, Circuit Judges.

BY THE COURT:—

IT IS ORDERED that the motion of appellant for appointment of counsel on his appeal in the above entitled and numbered cause be, and the same is hereby DENIED because the case is not a criminal case but a habeas corpus on a state case.

111 **Minute Entry of Argument and Submission—May 16, 1963**

(Omitted in printing)

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112 IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20235

UNITED STATES, ex rel. VICTOR LINKLETTER, *Appellant*,

versus

VICTOR G. WALKER, Warden, Louisiana State Penitentiary, Angola, Louisiana, and THE STATE OF LOUISIANA, *Appellees.*

Appeal from the United States District Court for the Eastern District of Louisiana.

Opinion—September 12, 1963

Before TUTTLE, Chief Judge, and RIVES and MOORE,* Circuit Judges.

RIVES, Circuit Judge: This is an appeal from a denial of a writ of habeas corpus. On May 28, 1959, the petitioner, Victor Linkletter, was convicted in the criminal district court for the Parish of Orleans for the crime of
113 simple burglary. This judgment was affirmed by the Louisiana Supreme Court February 15, 1960, and rehearing was denied on March 21, 1960. Petitioner is presently serving a nine-year sentence at hard labor in the Louisiana State Penitentiary.

On December 8, 1961, after the decision in the case of *Mapp* v. *Ohio*, 1961, 367 U.S. 643, the Judicial District Court of the Parish of West Feliciana denied petitioner a writ of habeas corpus which was based on the same grounds as the present petition. An appeal of this ruling to the Louisiana Supreme Court was likewise unsuccessful and rehearing was denied. A petition for writ of certiorari

* Of the Second Circuit, sitting by designation.

was denied by the United States Supreme Court on June 18, 1962. *Linkletter* v. *Walker*, 1962, 370 U.S. 928. This petition for habeas corpus was filed in forma pauperis in the Eastern District of Louisiana on July 10, 1962. The State concedes exhaustion of state remedies.

The main questions presented by this appeal are whether certain evidence used against petitioner was obtained by unlawful search and seizure, and if so, whether *Mapp* v. *Ohio, supra*, applies retroactively so as to subject this conviction, obtained prior to *Mapp*, to collateral attack.

Although there is some dispute as to the facts of the case, even the State's version suffices to show an illegal search and seizure. On August 16, 1958, a bar in New Orleans was burglarized and investigation revealed that entry had been gained through a window or skylight on the third floor. Burglar tools were found at the scene of the crime. Thereafter, on August 24, New Orleans
114 police officers commenced a stakeout at the St. Charles Hotel, which commanded a view of the square, or block, in which the burglary had been committed. In the course of the surveillance, officers observed petitioner and another enter a building in this block. They were carrying two objects that appeared to be oxygen tanks. The building they entered afforded ready access to other buildings in the block. Petitioner was seen to open a window on the third floor of the building, climb out on the roof, and reenter the building. He was shirtless and was wearing a pair of gloves. Shortly thereafter, as the two men left the building, they were arrested.

The arresting officers took the two men back to the third floor of the building and on the roof found an assortment of burglar tools and three loaded pistols. Petitioner was also searched and a key to his apartment was uncovered. Thereupon, he was taken by the police officers to his home, six to seven blocks away, and further evidence was uncovered. On August 26, officers again went with petitioner to his apartment and in addition went to his place of business, where other evidence was seized.

Petitioner's arrest was made without a warrant; and the search of his person, at the time of his arrest, and the searches of his residence and place of business, were all made without a search warrant. All of the

above evidence was introduced against petitioner at his trial.

115 The district court held that the arresting officers had reasonable cause for arrest under Louisiana law and probable cause within the meaning of the Fourth Amendment. Thus the arrest without a warrant was held lawful. The court also held that "there can be no doubt" as to the validity of the ensuing search and seizure since where the arrest is lawful, subsequent search and seizure incident to arrest is likewise valid.

Even if it is assumed that the arrest was lawful, we cannot agree that the searchers of petitioner's apartment and place of business were incidental thereto. The right to search incident to arrest does not extend to places other than that of the arrest. *Agnello* v. *United States,* 1925, 269 U.S. 20, 30; *Silverthorne Lumber Co.* v. *United States,* 1920, 251 U.S. 385, 390; *Staples* v. *United States,* No. 20114, 5th Cir., July 10, 1963, m/s. In *Agnello* the defendant was arrested when he was in the home of another. While the defendant was being taken to the police station, other officers searched his home, which was several blocks distant from the place of arrest. The Court held this search to be unlawful. Applying that holding to the present case, the subsequent searches of petitioner's apartment and place of business without a warrant were likewise illegal.

At the time when the searches took place (August 1958) and when the petitioner's conviction became final (March 1960), the case of *Wolf* v. *Colorado,* 1949, 338 U.S. 25 was controlling. It had held that the Fourteenth Amendment did not impose upon the states the requirement that illegally seized property be excluded from evidence.

116 However, on June 19, 1961, the Supreme Court overruled *Wolf* in *Mapp* v. *Ohio, supra,* thus making the exclusionary rule a constitutional requirement under the Fourteenth Amendment. Since petitioner timely objected to the introduction of this evidence and since exhaustion of state remedies has been conceded, the case before us squarely presents the issue of whether the rule in *Mapp* applies in a collateral attack on a pre-*Mapp* conviction. We hold that it does not.

It has been said that questions relating to the retroactivity of opinions "are among the most difficult of those which have engaged the attention of courts, state

and federal." *Chicot County Drainage District* v. *Baxter State Bank*, 1940, 308 U.S. 371, 374. Indeed, the retroactivity of *Mapp* is not a simple problem. Note, 25 *Geo. B.J.* 238, 242 (1962). As one author has stated, "The problem is not one of discovering a wholly satisfying or wholly logical solution, for none exists." Bender, "The Retroactive Effect of an Overruling Constitutional Decision: *Mapp* v. *Ohio*," 110 U. *Pa. L.Rev.* 650, 679 (1962). Ultimately, the solution must come from the Supreme Court. In the meantime, however, it is the obligation of the lower courts to endeavor to reach an authoritative, logical and just result.

Before proceeding further, it is necessary that the terms "retroactive" and "prospective," as used in this opinion, be defined. A purely prospective opinion would be one
117 in which the new rule of law is limited to the future only and not even made applicable to the case before the court. See, generally, *Great Northern Railway* v. *Sunburst Oil & Refining Co.*, 1932, 287 U.S. 358. This is not the situation here, however, since the exclusionary rule in Mapp was applied to reverse Miss Mapp's conviction.[1] Also, the recent Supreme Court decision in *Ker* v. *California*, N. 53, Oct. Term 1962, decided June 10, 1963, m/s, applied *Mapp* where the seizure and trial were before the *Mapp* decision but the direct appeal was not until after *Mapp* was rendered.[2] Thus, we are only now concerned with whether or not *Mapp* applies to a conviction which had become final before that case had been decided, and we accordingly limit the terms "prospective" and "retroactive." This opinion does not deal with the availability of collateral attack on a post-*Mapp* conviction.

We must first reach the question of whether a holding of prospective application, as used in this case, would be constitutional. The Supreme Court in *Chicot County*

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1 It has been argued that a federal court cannot render a purely prospective decision because of the case and controversy requirement of the Constitution. See Note, 71 *Yale L.J.* 907, 930-933 (1962).

2 The search and seizure occurred in July 1960. The California District Court of Appeals affirmed the conviction on August 29, 1961, and rehearing was denied on October 25, 1961. 195 Cal. App. 2d 246, 15 Cal. Rptr. 767 (1961). *Mapp* was decided on June 19, 1961.

Drainage District v. *Baxter State Bank*, 1940, 308 U.S. 371, 374, said:

"The effect of the subsequent ruling as to invalidity [of an unconstitutional statute] may have to be con-
118 sidered in various aspects,—with respect to particular conduct, private and offical. Questions of rights claimed to have vested, of status, or prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statue and of its previous application, demand examination . . . . [I]t is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity [of statutes] cannot be justified."

And in *Great Northern Railway* v. *Sunburst Oil & Refining Co., supra*, the Supreme Court held that a *purely* prospective decision of the Montana Supreme Court, overruling an earlier determination by that court, was not unconstitutional. The Supreme Court, through Mr. Justice Cardozo, stated that such a diversion in time of the effects of a decision, whether sound or unsound, is not a denial of any federal constitutional right—the federal Constitution has no voice on the subject. He stated that "never has any doubt been expressed" that a court may so rule, whenever injustice or hardship will thereby be averted. 287 U.S. at 364.[3]

Thus constitutional, is there a philosophical barrier to the prospective overruling of a prior decision?[4] The
119 traditional Blackstonian view was that a court does not pronounce a new law, but maintains and expounds the old one; when a decision has been overruled, the first one was merely evidence of the law, which had turned out to be erroneous evidence. See Note, 71 *Yale L.J.* 907, 908 (1962). That is, a judge *finds* the law; he

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[3] Accord, *e.g.*, State v. Smith, 37 N.J. 481, 181 A. 2d 761, 762-65 (1962) (referring to *Mapp* case); see Note, 16 *Rutgers L. Rev.* 587, 588-91 (1962); *cf.* Safarik v. Udall, D.C. Cir. 1962, 304 F. 2d 944, 950.

[4] *Sunburst* also ruled that the choice of philosophical approach was not of constitutional concern. 287 U.S. at 365.

does not *make* it. This theory, when applied to the problems before us, inevitably leads to the following analyiss:

> "It must be recognized that, since Weeks and Wolf, there had been no change in the constitutional requirements of due process considered and found controlling in Mapp. If the protections are there now, were they not present when Wolf was decided and were they not present when Hall was tried, convicted and sentenced? An affirmative answer would appear to be inescapable."

Hall v. *Warden*, 4 Cir. 1963, 313 F. 2d 483, 495. But the more modern view, as espoused by Mr. Justice Cardozo and the other legal realists, is that judges exercise a law-creating function, although, of course, subject to the limitation of unreasonable "judicial legislation." See Note, 71 *Yale L.J.* 907, 911 (1962). We believe this is a more straightforward and realistic attitude than the
120 fiction of Blackstone.[5] It would hardly serve to quell the all too vociferous critics of the courts to

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[5] Our view closely aligns with that of Mr. Justice Cardozo. As he stated, "'The theory of the older writers [Coke, Hale and Blackstone] was that judges did not legislate at all. A pre-existing rule was there, imbedded, if concealed, in the body of the customary law. All that judges did, was to throw off the wrappings, and expose the statute to our view. *Since the days of Bentham and Austin, no one, it is believed, has accepted this theory without deduction or reserve, though even in modern decisions we find traces of its lingering influence.*'" Cardozo, The Nature of the Judicial Process, p. 124-5 (1921). (Emphasis added.)

"We must get away at one extreme from the notion that law is fixed and immutable, that the conclusion which the judge declares, instead of being itself a more or less tentative hypothesis, . . . has a genuine preexistence, that judgment is a process of discovery, and not in any degree a process of creation. This is the extreme of which Blackstone is the most eminent exponent. On the other hand, we must avoid the other extreme . . .—the conception of law as a series of isolated dooms . . . . Each extreme has a tendency, though for a different reason, to stifle the creative element." Cardozo, The Growth of Law 53-54 (1924).

To Cardozo the law was that body of principle and dogma which, with a reasonable measure of probability, may be used as the basis for judgment in pending or future controversies. Judges have the power to legislate, but not always the right. They have the right to legislate when there are gaps in

tell them that the court did not make the law, but merely found what had been there all along. Surely the above quote from page 374 of the *Chicot County* case, *supra*, bears out the conclusion that the Supreme Court has taken the more modern approach. See *Griffin* v. *Illinois*, 1956, 351 U.S. 12, 26 (concurring opinion of Frankfurter, J.); Note, 16 *Rutgers L.Rev.* 587, 590 (1962).

With these constitutional and philosophical barriers aside, we may now proceed to a determination of
121 the class of case into which the *Mapp* decision falls—prospective or retroactive. The first place to look, of course, is the *Mapp* opinion itself. It would seem that the very *least* that could be said is that the opinion is not clear as to whether it should be given retroactive effect.[6] It is our opinion that the decision in *Mapp* leaves the question open so that we may make our own determination as to retroactivity. *Accord, Gaitan* v. *United States*, 10 Cir. 1963, 317 F. 2d 494, 497; Traynor, "Mapp v. Ohio at Large in the Fifty States," 1962 *Duke L.J.* 319; Bender, *"The Retroactive Effect of an Overruling Constitutional Decision; Mapp* v. *Ohio,"* 110 *U.Pa. L. Rev.* 650, 671 (1962); Note, 25 *Geo. B.J.* 238 (1962); Note, 16 *Rutgers L. Rev.* 587, 595 (1962); *cf.* Note, 71 *Yale L.J.* 907, 937 n. 164 (1962). True, some authors have pointed to certain language which is supposed to hint at, or show an aware-

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the law, but even then, the judge "is not free to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles." Cardozo, The Nature of the Judicial Process, 141 (1921).

As to the location of the line of division between opinions which should be given retroactive effect and those which should be prospective only, Cardozo said: "I feel assured, however, that its location, wherever it shall be, will be governed, *not by metaphysical conceptions of the nature of judge-made law*, nor by the fetich of some implacable tenet, such as that of the division of governmental powers, but by considerations of *convenience*, of *utility*, and of the deepest sentiments of *justice*." Cardozo, The Nature of the Judicial Process, 148-49 (1921). (Emphasis added.)

[6] *E.g.*, Hall v. Warden, 4 Cir. 1963, 313 F. 2d 483, 494; United States *ex rel.* Gregory v. People, N.D. N.Y. 1961, 195 F. Supp. 527, 528; Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp* v. *Ohio*, 110 *U. Pa. L. Rev.* 650, 668 (1962); Note, 16 *Rutgers L. Rev.* 587, 588 (1962).

ness of, retroactivity.[7] They invariably rely on footnote nine of the majority opinion:

"9.

> As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. We note,
> 122 moreover, that the class of state convictions possibly affected by this decision is of relatively narrow compass when compared with *Burns* v. *Ohio*, 360 U.S. 252, *Griffin* v. *Illinois*, 351 U.S. 12, and *Herman* v. *Claudy*, 350 U.S. 116. In those cases the same contention was urged and later proved unfounded. In any case, further delay in reaching the present result could have no effect other than to compound the difficulties." 367 U.S. at 659 n. 9.

Also frequently pointed to is the following language in Mr. Justice Harlan's dissent.

> "[T]he issue which is now being decided may well have untoward practical ramifications respecting state cases long since disposed of in reliance on *Wolf* . . . ." 367 U.S. at 676.

On the other hand, some courts have drawn implications of prospectivity out of the language in the opinion;[8] for instance, the use of such words as "then," "today," and "no longer." None of these arguments convinces us that the Court has made a conscious disposition of this issue.[9]

As yet, only a few lower court cases have reached the issue of *Mapp's* retroactivity. However, the Fourth

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[7] *E.g.*, Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf* in *Kurland*, 1961—*The Supreme Court Review* 1, 43-44 (1961); Morris, *The End of an Experiment in Federalism—A Note on Mapp* v. *Ohio*, 36 *Wash. L. Rev.* 407, 432 (1961); Redlich, *1961 Survey of New York Law—Constitutional Law*, 36 *N.Y.U.L.* Rev. 1417, 1423 (1961).

[8] *E.g.*, People v. Figueroa, 220 N.Y.S. 2d 131 (Kings Cty. Ct. 1961); Hall v. Warden, D. Md. 1962, 201 F. Supp. 639, rev'd 313 F. 2d 483 (4 Cir. 1963).

[9] "There is no reason not to consider it now, in a proper case. This ought to be done, if deep consideration is the proper basis for lasting judgment." Bender, *supra* note 5, at 671.

123 and Tenth Circuits have already come to contrary conclusions. In *Hall* v. *Warden*, 4 Cir. 1963, 313 F. 2d 483, the Fourth Circuit, en banc, held that *Mapp* does apply retroactively in a habeas corpus proceeding. The court pointed out that the intent of the Supreme Court is not clear from the opinion in *Mapp*. The court noted Mr. Justice Harlan's dissent and footnote nine of the majority opinion, but apparently did so only to refute the district court's finding of prospective intent. As already pointed out, the real crux of the *Hall* case seems to be a Blackstonian approach to the judicial process. It may be of some significance that Hall had been sentenced to death, for the court said:

> "Perhaps the District Court may have been somewhat reluctant to be the first to apply Mapp retroactively, but it appears now that unless it is so applied and Hall's case is the first to be decided on that ground, the decision—at least for him—will be the last." 313 F. 2d at 497.

In *Gaitan* v. *United States*, 10 Cir. 1963, 317 F. 2d 494, the Tenth Circuit held that *Mapp* was prospective. The question arose in a more complex manner than in the instant case or the *Hall* case. Gaitan had been convicted of a federal crime prior to both *Elkins* v. *United States*, 1960, 364 U.S. 206, and *Mapp* under the so-called "silver platter" doctrine. After the decision in *Elkins*, but before *Mapp*, he collaterally attacked the conviction by a proceeding under 28 U.S.C. §2255, claiming *Elkins* was retroactive. This was denied on the ground that *Elkins* involved
124 a rule of evidence only and could not be raised by means of collateral attack. After *Mapp*, Gaitan brought this section 2255 proceeding claiming *Mapp* retroactively made *Elkins* a constitutional ruling and that *Elkins* was retroactive. *Mapp* was held not to be retroactive. We agree with the *Gaitan* decision insofar as it rejects *Hall* and the Blackstonian approach: "The assertion that the later decisions [*Elkins* and *Mapp*] were always the law departs from reality . . . . On the one hand we have the idea that the latest interpretation of the Constitution is what the Constitution has always said and meant. On the other hand is the practical realization that the inter-

pretation of the Constitution changes and has changed from time to time." 317 F. 2d at 497-98. But we do not necessarily adopt all of the reasoning in the *Gaitan* case. For instance, we do not think that *Patterson* v. *Colorado*, 1907, U.S. 454, or *Sunal* v. *Large*, 1947, 332 U.S. 174, are relevant as to the retroactivity of *Mapp*. Those cases held that a conviction based on a nonconstitutional rule of law, which is later reversed, does not involve a lack of procedural due process and accordingly is not subject to collateral attack. Thus, even if the nonconstitutional rule applies retroactively, there is no post-conviction remedy because there has been no deprivation of any constitutional right. But if a constitutional decision, such as *Mapp*, applies retroactively, clearly there is a remedy for such a constitutional deprivation. Nor do we wish our holding to be as broad as *Gaitan* might be interpreted. A decision should be limited to prospective application only
125 where the rigid tests which we have set out *infra* are met.

We have found only one other federal district court to have ruled on the retroactivity of *Mapp*. The Northern District of California in *Hurst* v. *People*, 1962, 211 F.Supp. 387, 391, applies *Mapp* retroactively in a habeas corpus proceeding. The court relied on *Griffin* v. *Illinois*, 1956, 351 U.S. 12, and *Eskridge* v. *Washington*, 1958, 357 U.S. 214, which we discuss *infra*. The lower state courts in New York have consistently refused to apply *Mapp* retroactively in post-conviction proceedings. The first such holding was *People* v. *Figueroa*, 220 N.Y.S.2d 131 (Kings Cty. Ct. 1961), based on the language in *Mapp* and criticized in Redlich, "1961 Survey of New York Law—Constitutional Law," 36 *N.Y.U.L.Rev.* 1417, 1421-23 (1961). Pennsylvania has come to the same conclusion as New York, *Commonwealth ex rel. Stoner* v. *Myers*, Pa. Super.Ct. 1962, 185 A.2d 806; and an excellent concurring opinion by Judge Traynor indicates that California may do likewise. *In re Harris*, Cal. 1961, 366 P.2d 305, 306.[10]

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[10] A number of states have held that *Mapp* applies retroactively to cases on appeal when *Mapp* was decided. *E.g.*, Commonwealth v. Spofford, Mass. 1962, 180 N.E. 2d 673; State v. Smith, 1962, 181 A. 2d 761; People v. Loria, 1961, 179 N.E. 2d 478. As already indicated, Ker v. California, U.S. (1963), would seem to have settled that question.

The proper test for determining the retroactive effect which should be given to a decision has been well stated by a writer in the Yale Law Journal:

> "In deciding whether to give a new rule retroactive effect, a court to which the issue properly has been
> 126 presented first should attempt to identify the purpose of the new rule, next should determine whether on balance those purposes will be served by general retroactive application of the new rule, and finally should decide whether these purposes will be promoted by retroactive application of the new rule in the particular case before it."

Note, "Prospective Overruling and Retroactive Application in the Federal Courts," 71 *Yale L.J.* 907, 942 (1962). No determination should be made without giving careful consideration to the purposes of the new rule and to the equitable and effective operation of the legal system. Note, 71 *Yale L.J.* 907, 951 (1962); see Bender, *supra* note 5. Compare test suggested in Note, 16 *Rutgers L.Rev.* 587, 592 (1962).

The first step is to define the *newly created* rule. It is only the extent to which *Mapp* changed the existing law in which we are interested, for those matters which were already part of the law before *Mapp* apply to the petitioner through their own force and without the need of retroactive application. The only change brought about by the *Mapp* decision was that the exclusionary rule of *Weeks* v. *United States*, 1916, 232 U.S. 383, is now part of the Fourteenth Amendment. It is important to note that the right of privacy against unlawful search and seizure was already incorporated in the Fourteenth Amendment when *Mapp* was decided. The Court in *Wolf* v. *Colorado*, 1949, 338 U.S. 25, said:

> 127 "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause . . . . Accordingly, we have no hesitation in saying that were a State affirmatively

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> to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of *enforcing* such a basic right raise questions of a different order." (Emphasis added.) 338 U.S. at 27-28.

The Court in *Mapp* merely added the exclusionary rule to the right of privacy recognized in *Wolf*: "Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against such invasion of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise." *Mapp* v. *Ohio*, 367 U.S. at 660.

Once the exclusionary rule is separated from the basic right to privacy itself, it becomes clear that the purpose of the exclusionary rule is to enforce the right of privacy as a deterrent. *Mapp* explicity held this—

> "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of
> 128 the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' Elkins v. United States, supra, at 217." 367 U.S. at 656.

Thus the exclusionary rule's purpose of deterrence, unrelated in any way with actual guilt or the probative value of the evidence, has been recognized by the writers. See Traynor "Mapp v. Ohio at Large in the Fifty States," 1962 *Duke L.J.* 319, 320, 341; Bender, *supra*, note 5, at 660-61; Note, 71 *Yale L.J.* 907, 942 (1962); Note, 16 *Rutgers L.Rev.* 587, 593 (1962). It might be argued that, following Mr. Justice Black's concurring opinion, the reason for the exclusionary rule is to prevent unfairness at trial—the same unfairness involved in self-incrimination. This is based on Mr. Justice Black's theory that the Fourth Amendment must be considered along with the Fifth Amendment, which together produce the exclusionary rule in question. See *Boyd* v. *United States*, 1885, 116 U.S. 616. We reject such an argument. In the first place, the ma-

jority opinion does not rely on the Fifth Amendment or self-incrimination, nor did *Weeks*; and, in the second place, the exclusionary rule of the Fifth Amendment does not apply through the Fourteenth. *Adamson* v. *California*, 1947, 332 U.S. 46. The majority opinion did not mention *Adamson*, much less overrule it. See Bender, *supra* note 5 at 664-68; *cf. State* v. *Smith*, 37 N.J. 481, 181 A.2d 761 (1962); *Mapp* v. *Ohio*, 367 U.S. at 657.

129 It might be argued that since the majority opinion analogized evidence received in an unlawful search and seizure with a coerced confession, see 367 U.S. at 656-57, the Court was recognizing an inherent unfairness, rather than deterrence, as a reason for preventing the use of unlawfully seized evidence. *Cf. Mapp* v. *Ohio*, 367 U.S. at 683-85 (dissenting opinion). But it can effectively be argued that the purpose of excluding a coerced confession, even assuming it is reliable evidence, is likewise the deterrence of lawless police action. See Traynor, 1962 *Duke L.J.* at 325-26 n. 18.

The next step deals with whether the purpose of the rule will be served by retroactive application:

> "Would the release from prison of every person whose conviction was based on illegally seized evidence have any effect in deterring unconstitutional searches? Assuming a finding of some deterrent effect, would it be substantial enough to outweigh the undesirability of reversing the convictions of many assumedly guilty prisoners?"

Note, 71 *Yale L.J.* 907, 942 (1962). The deterrent effect of retroactively applying *Mapp* will be slight, if any. The prospect of having illegally seized evidence excluded from a particular trial will deter officers far more than the wholesale reversal of past convictions. Deterrence, itself, is a particularly prospective purpose. Bender, *supra* note 5, at 661-62. And on the other side of the scale, "to place at the disposition of the guilty an extraordinary

130 remedy designed to insure the protection of the innocent would be to invite needless disruption in the administration of justice." Traynor, 1962 *Duke L.J.* at 341; see Note, 16 *Rutgers L.Rev.* 587, 596 (1962). This prospect has likewise been of concern to Judge Friendly

of the Second Circuit, see Friendly, "Reactions of a Lawyer—Newly Become Judge," 71 *Yale L.J.* 218, 236 n. 105 (1962), for at the time *Mapp* was decided one-half of the states allowed illegally seized evidence to be introduced. 367 U.S. at 680. We conclude that whatever slight deterrent effect, if any, *Mapp* might have if applied retroactively is insufficient to warrant the release of all of these presumably guilty prisoners.[11]

Several courts have pointed to *Griffin* v. *Illinois*, 1956, 351 U.S. 12, which ruled that it was a violation of the Fourteenth Amendment to deprive a person because of his indigency of a free transcript of his criminal trial in order to perfect an appeal. *Hall* v. *Warden*, 313 F.2d at 495; *Hurst* v. *People*, 211 F.Supp. at 395. In his concurring opinion, Mr. Justice Frankfurter argued that *Griffin* should be applied prospectively only. 351 U.S. at 25-26. But in *Eskridge* v. *Washington*, 1958, 357 U.S. 214 (per curiam), *Griffin* was applied retroactively in a habeas corpus proceeding concerning a 1935 conviction.[12] How-
131 ever, applying the test we have set out, the distinction between *Mapp* and *Griffin* becomes clear. The rule in *Griffin* is to provide fairness in procedure, not the prospective objective of deterrence. See Bender, *supra* note 5, at 672-73. Also, *Griffin* was not an overruling decision. The lack of precedent for prospective overruling in procedural due process cases might well be explained by the fact that few such rules would be found to be prospective under the test we have outlined. Indeed, *Mapp* is an unusual case. *Cf.* Note, 16 *Rutgers L.Rev.* 587, 593 (1962).

Some will no doubt say that to apply *Mapp* in the future and not in the past is unfair and undemocratic. See Note, 25 *Geo. B.J.* 238, 241 (1962). But the time of trial or of conviction is frequently of great importance to a defendant

[11] It should be pointed out that this decision is not merely based on the great administrative burden which would be placed on the courts should *Mapp* be applied retroactively, for prisoners as well as tort claimants have a right to crowd court dockets. Instead, this decision is based on the fact that such litigation would fail to serve the purpose for which the right was created.

[12] Justices Harlan and Whittaker dissented. *Compare* Patterson v. Medberry, 1961, 368 U.S. 839 (Memorandum of Harlan, J., on denial of certiorari), *with* Norvell v. Illinois, 1963, 373 U.S. 420.

or litigant and is usually a reasonable ground for classification. It is true that it does not serve the purpose of deterrence to apply *Mapp* to a person whose appeal was pending at the time *Mapp* was decided. The reason for applying the rule is because if *Mapp* had not reached the Court first, these cases could as well have been the vehicle for overruling *Wolf*. See Bender, *supra* note 5, at 676-77. Their cases were not yet past history when *Mapp* was decided.

132 For the reasons stated herein, the district court's denial of the writ of habeas corpus is

AFFIRMED

TUTTLE, Chief Judge, DISSENTING:

With much deference to the views of my colleagues, I must dissent. I agree that the search in this case was illegal. I also agree that in deciding *Mapp* v. *Ohio, supra*, the Supreme Court did not give clear guidance to the trial or circuit courts which must now determine whether the relief afforded Mapp is to be made available to others in post-conviction proceedings where their trial and conviction had been finally disposed of before the *Mapp* decision. The choice that this Court has between giving retrospective as well as prospective effect to Mapp is a choice that has been made by two Courts of Appeal for different Circuits. The Tenth Circuit has held, in accordance with the decision of the majority here, that the Supreme Court, by implication, pointed the direction in prospective application only. See *Gaitan* v. *United States*, 317 F. 2d 494. The Fourth Circuit, by an en banc opinion,[1] held that Mapp must be applied retroactively, *Hall* v. *Warden, etc.*, 313 F. 2d 483.

Both Courts recognized that the exclusionary rule now adopted by the Supreme Court is one required by the Constitution itself. "The decision in Mapp scotched
133 all notion that only *evidentiary rules* were involved." *Hall* v. *Warden, Maryland Penitentiary, supra.* In this situation I must align myself with what the majority

[1] There were two dissents, but these dissents were based on differences between the members of the Court on the legality of the search itself. The dissenting judges did not reach the question of retroactive application.

opinion calls "the traditional Blackstonian view," which is "that a court does not pronounce a new law, but maintains and expounds the old one;" as contrasted with those who believe "that judges exercise a law creating function." I find myself fully in accord with the statement from *Hall* v. *Warden*,

> "It must be recognized that, since Weeks and Wolf, there had been no change in the constitutional requirements of due process considered and found controlling in Mapp. If the protections are there now, were they not present when Wolf was decided and were they not present when [Linkletter] was tried, convicted and sentenced? An affirmative answer would appear to be inescapable."

To me the most persuasive thought which leads me to conclude that the Supreme Court did not intend to restrict Mapp to prospective application is that it did not say so. As stated by the Court in the *Hall* case,

> "It is significant that the Supreme Court did not specifically declare the effect of its decision was to operate only in the future, as it might have done."

With every deference to the views of my colleagues, my best judgment is that it will not do so.

134 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1962

No. 20,235

D. C. Docket No. 648 Misc. B.R.Div.

UNITED STATES, EX REL. VICTOR LINKLETTER, *Appellant*,

v.

VICTOR G. WALKER, Warden, Louisiana State Penitentiary, Angola, Louisiana, and THE STATE OF LOUISIANA, *Appellees*.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before TUTTLE, Chief Judge, and RIVES and MOORE*, Circuit Judges.

Judgment—September 12, 1963

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Tuttle, Chief Judge, Dissents"

September 12, 1963

Issued as Mandate: Nov. 21, 1963

* Of the Second Circuit, sitting by designation.

130

(File endorsement omitted)

135 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20235

UNITED STATES, EX REL. VICTOR LINKLETTER, *Appellant*,

v.

VICTOR G. WALKER, Warden, Louisiana State Penitentiary, Angola, Louisiana, and THE STATE OF LOUISIANA, *Appellees*.

Appellant's Motion for Re-Hearing—Filed September 27, 1963

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

The petition of VICTOR LINKLETTER, petitioner and appellant in the above entitled and numbered cause, with respect, good cause appearing, represents;

1.

That by judgment of this Honorable Court, dated Thursday, September 12, 1963, the Court affirmed the Honorable United States District Court's denial to grant to Petitioner a writ of habeas corpus.

2.

Petitioner avers that the judgment of this Honorable Court in affirming the decision of the Lower Court is erroneous and that he has been aggrieved thereby; that said judgment is contrary to the Constitutional rights of your Petitioner under the 4th., 5th., and Due Process of Law of the 14th. Amendment's to the United States Constitution and that Petitioner desires to file herewith his application for re-hearing to the end that said judgment be reviewed all in accordance with the provisions of Rule 29 of this Court and with provisions afforded in behalf of poor persons in forma pauperis cases under Rule 24 of this Honorable Court.

136 3.

Petitioner avers that the denial to him by this Honorable Court of adjudication as to his contentions that he

was illegally arrested and that an "unreasonable" search and seizure was conducted by the police against the person of Petitioner is particularly erroneous and contrary to the Constitutional rights of Petitioner under the 4th. and 14th. Amendments to the Federal Constitution.

The case of Petitioner has only been partly adjudicated and therefore denies him due process of law. Certain evidence was seized from the pockets of Petitioner during the contended illegal arrest and was later used as evidence during the trial and your Petitioner was prejudiced thereby.

4.

Petitioner avers that he has been deprived of a fair opportunity to establish his allegations that he was illegally arrested and that an "unreasonable" search and seizure was made against his person. It is deemed that a hearing with witnesses in his presence was necessary in order to review the question: "As To Whether or Not His Arrest Was Based on Probable Cause Within the Meaning of the 4th. and 14th. Amendments". This Honorable Court on Page two (2) of their opinion said: "There are Some Disputes as to the Facts of the Case". Petitioner contends that *some* of these disputed facts pertain to his illegal arrest and the search of his person, which facts, if resolved by testimony, rather than merely by affidavits, would readily show that Petitioner's claim that he was illegally arrested would prove to be true and that the story as presented to the Court by the State would prove to be false.

5.

Petitioner had presented uncontradicted evidentiary facts in his writs and briefs, which facts were taken from Official Court records as proof that his arrest was illegal and violated his Constitutional rights. Petitioner contends that the burden should fall on the State to *show proof* that his arrest was based on probable cause. The Court records in the instant case do not show clearly what had happened during the arrest of Petitioner.

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6.

Petitioner here would clarify the State's contention that he was legally arrested for the crime of this cause.

Under date of August 24th., 1958, Petitioner was arrested on suspicion in order to investigate the charge for the crime of this cause. After five (5) days detention at the police station the District Attorney refused to accept any charges that were placed against Petitioner as a result of this August 24, 1958 arrest. However, at the end of the five (5) day detention at the police precinct, a new and different charge was placed against Petitioner and as to this new charge, as of this date nobody has ever been called up for trial, which charge is now over Five (5) years old. Under the New Orleans Police Department's No. 59776, the records of this department would reflect that Petitioner was not arrested for the crime of this cause until September 12, 1958.

The police officers that conducted this arrest were never at any time in Court as witnesses during the entire trial. The District Attorney during the trial passed off as the legal arrest, the one that occurred on August 24, 1958, which arrest was originally refused when presented to him.

For the reasons shown above and the reasons set forth in the habeas corpus petition and appeal brief of Petitioner it is contended that his arrest was without reasonable and probable cause and therefore in violation of his Constitutional rights under the 4th. and 14th. Amendments to the Federal Constitution.

7.

Petitioner fully realizes that this Honorable Court has fully considered his case pertaining to the matter of his contended illegal searches and seizures of his home and business establishment. And it is greatly appreciated that the members of the Court have written at length. But even for the lowest of its Citizens, this Honorable Court has always been quick to rectify any errors that have been made towards those that seek help. This Petitioner prays that now this Honorable Court in this same spirit will look again into the record and grant his application for writ of habeas corpus.

Petitioner here would like to bring to the attention of this Honorable Court the case, *Rochin* v. *People of California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, which case raised the same search-and-seizure question as the present case, however the U.S. Supreme Court avoided the question and never once mentioned the case *Wolf* v. *People of State of Colorado*, 338 U.S. 25, 27, 69 S. Ct. 1359, 1361, 93 L. Ed. 1782.

Rochin, supra, decided that the Due Process Clause of the Fourteenth Amendment does not leave States free in their prosecutions for crime.

In the present case Petitioner asks this Honorable Court to adjudicate his case as a whole, which would include all of his contentions pertaining to an illegal arrest and other contended illegal searches and seizures that were not taken into consideration by this Court.

It is the contention that the present case if adjudicated as a whole, would show that his conviction was secured by methods which offend elementary standards of justice, and here Petitioner wishes to invoke the protection of the Fourteenth Amendment.

WHEREFORE, Petitioner prays that this application for rehearing be granted and that in due course the judgment of the Lower Court be reversed and set aside and Petitioner's sentence and conviction be vitiated, or annuled.

Petitioner further prays for all such further relief as law, equity and the nature of the case will permit.

By: VICTOR LINKLETTER
Victor Linkletter
244 N. Oak Street
Opelousas, Louisiana
Petitioner and Appellant

(Certificate of Service omitted in printing)

(File endorsement omitted)

140 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20235

UNITED STATES, EX REL. VICTOR LINKLETTER, *Appellant*,

v.

VICTOR G. WALKER, Warden, Louisiana State Penitentiary, Angola, Louisiana, and THE STATE OF LOUISIANA, *Appellees*.

Appeal from the United States District Court for the Eastern District of Louisiana.

Order Denying Petition for Rehearing—October 29, 1963

Before TUTTLE, Chief Judge, and RIVES and MOORE*, Circuit Judges.

PER CURIAM:

The petition for rehearing in the above-styled and numbered cause is hereby

DENIED.

CHIEF JUDGE TUTTLE DISSENTS.

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141 **Order Recalling and Staying Mandate—December 12, 1963**

(Omitted in printing)

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* Of the Second Circuit, sitting by designation.

142 IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20235

UNITED STATES, EX REL., VICTOR LINKLETTER, *Appellant*,

v.

VICTOR G. WALKER, Warden, Louisiana State Penitentiary, Angola, Louisiana, and THE STATE OF LOUISIANA, *Appellees*.

Appeal from the United States District Court for the Eastern District of Louisiana

Order Appointing Counsel to Represent Appellant in the Supreme Court of the United States—December 12, 1963

On motion of the appellant, Victor Linkletter, "that he desires this Court to appoint or obtain counsel to represent him for the purpose of seeking further review of his case in the United States Supreme Court," IT IS ORDERED that the Honorable Truman M. Hobbs and Euel A. Screws, Jr., Attorneys at Law, 444 South Perry Street, Montgomery, Alabama, be and they are hereby appointed as attorneys to represent the said Victor Linkletter and to present to the Supreme Court of the United States a petition for writ of certiorari to review the final judgment and decision of this Court, and to represent the said Linkletter in such certiorari proceedings.

Enter for the Court this the 12th day of December 1963.

RICHARD T. RIVES
United States Circuit Judge

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143 **Order Transmitting Record on Appeal to the Supreme Court of the United States—Filed December 17, 1963**

(Omitted in printing)

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144 (Clerk's Certificate to foregoing transcript omitted in printing.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 999 Misc.

VICTOR LINKLETTER, *Petitioner*,

v.

VICTOR G. WALKER, *Warden*

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Order Granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari—Ma. 18, 1964

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1125 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 95

VICTOR LINKLETTER,

Petitioner,

vs.

VICTOR G. WALKER, Warden, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 95

VICTOR LINKLETTER,

Petitioner,

vs.

VICTOR G. WALKER, Warden, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The decision of this Court denying petitioner's petition for certiorari to the Louisiana Supreme Court is reported at 370 U. S. 928. The majority and dissenting opinions of the United States Court of Appeals for the Fifth Circuit are reported at 323 F. 2d 11. The decision of this Court granting this petition for writ of certiorari is reported at ——U. S. ——, 84 S. Ct. 1340.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and by virtue of this Court's order entered May 18, 1964, granting petitioner's petition for a writ of certiorari, 84 S. Ct. 1340.

Statutes Involved

There are no statutes involved. The Fourth, Fifth and Section 1 of the Fourteenth Amendments to the Constitution of the United States are involved:

IV The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

XIV Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Questions Presented

1. Where this Court has held that a state court conviction based on illegally obtained evidence violates the United States Constitution and, therefore, may not stand, can a state continue to hold in prison this petitioner whose conviction was obtained by such illegal evidence merely because his conviction became final before such holding by this Court?

2. Did this Court intend that relief from a conviction obtained in violation of a citizen's basic Constitutional rights, as defined in *Mapp* v. *Ohio*, be denied to a citizen who was deprived of such right prior to the date of such decision?

3. Does the decision of the Court below, denying to Petitioner the enforcement of the personal constitutional right defined in *Mapp* v. *Ohio*, for the sole reason that Petitioner's case was decided prior to the decision in *Mapp*, assign to petitioner and others similarly situated a lower constitutional status than that given to persons whose cases were decided after *Mapp* v. *Ohio*?

4. Does the decision of the Court below, in refusing to enforce the personal constitutional right to privacy in favor of petitioner solely because of the untimeliness of the deprivation of this right by the state, violate the Fifth Amendment to the Constitution of the United States?

5. Conceding only for argument that this Court intended *Mapp* to have prospective application, would not the fact that the illegal search in *Linkletter* (on August 24, 1958) occurred after the illegal search in *Mapp* (May 23, 1957) render it mandatory that the *Mapp* rule be given application to this case?

Statement of the Case

A burglary allegedly occurred in New Orleans on August 16, 1958. On August 24, 1958 after petitioner had been under surveillance for two days (R. 82-83) he was arrested without a warrant while walking on St. Charles Street near Canal in downtown New Orleans (R. 89).

The arresting officers, without arrest or search warrant, took from petitioner's person a key ring and five keys, including a key to his apartment (323 F. 2d 12; R. 6, 12-13). These keys were received in evidence as Exhibit S-27 in petitioner's state trial (R. 11). After the arrest, the officers kept petitioner in a parked police automobile for some time and then took petitioner into a vacant building while the officers searched the same. Petitioner was restrained by the officers and kept in custody some three hours before he was taken to police headquarters and charged (R. 10, 14, 15, 90). This vacant building was the place where the police physically searched and took the keys from petitioner's person (R. 12, 13). While petitioner was being charged at the police precinct (R. 7), police officers took the keys, went to petitioner's home at 930 Poydras Street, New Orleans, and entering the same by use of the keys made an extensive search (R. 18), seizing personal papers and property belonging to petitioner which admittedly had not been stolen (R. 18, 22). "Continuing in their defiance of the Law", 367 U. S. at 644, during the next two days the police searched petitioner's place of business on at least two occasions and again searched his house, each of these searches being without a warrant. Personal property was seized or taken during these searches and was introduced in evidence at petitioner's trial (R. 19-23, 71, 86-88). Admittedly the arrest and four searches of petitioner's home, person and place of business, and the seizure of his prop-

erty were made without warrant of arrest or search warrant (323 F. 2d at 12).

After the said three hour detention Petitioner was charged with four alleged burglaries (R. 6), but the charges were dropped by the District Attorney after three days (R. 8). After two more days of imprisonment, petitioner was charged on a conspiracy count (R. 8) and released on bond. On September 12, 1958, twenty days after the initial arrest, petitioner was charged with simple burglary of a bar at 134 Carondelet Street, the crime for which he was subsequently convicted (R. 5, 8, 99). The Police Major McNamara testified that the charge of simple burglary of the bar at 134 Carondelet Street had "nothing to do" with the "initial arrest" (R. 67). And the arresting officer thought petitioner was investigated for and booked on another suspected burglary (R. 90).

Therefore Petitioner, like Miss Mapp, was apparently convicted of a crime wholly unrelated to the original illegal search by the use of evidence discovered by such search.

The Fifth Circuit correctly held that "even under the State's version" the various searches of petitioner's apartment and place of business, without warrants and so far removed from the scene of arrest, were illegal (323 F. 2d 12), citing, *Agnello* v. *United States*, 269 U. S. 20, 30, among other authorities.

Petitioner was tried and convicted on May 28, 1959, 323 F. 2d 11. This was his first felony conviction. He received a 9-year sentence at hard labor, 323 F. 2d 11. Petitioner's subsequent appeal to the Louisiana Supreme Court was affirmed on February 15, 1960 and rehearing denied on March 21, 1960 (323 F. 2d at 11). The co-defendant, who was tried and convicted and sentenced to nine years along with petitioner, had his conviction reversed and was discharged by the Louisiana Supreme Court (R. 9).

Slightly over a year later, on June 19, 1961, *Mapp* v. *Ohio*, 367 U. S. 643, was decided. Immediately thereafter, petitioner filed a petition for habeas corpus in the Judicial District Court of the Parish of West Feliciana, Louisiana (323 F. 2d 11, 12). This petition was on the ground that petitioner's conviction resulting from admission of unconstitutional evidence must be overturned under the rule of *Mapp*. The writ was denied on December 8, 1961. Petitioner spent the next two years exhausting his state remedies, a fact conceded by the State of Louisiana (323 F. 2d at 12).

In the petition filed in the lower state court and in each subsequent petition and appeal petitioner has attacked the constitutionality of his conviction under the rule of *Mapp* (323 F. 2d at 12).

In the case below the Fifth Circuit met petitioner's contentions head on and held that since the introduction of the illegal evidence was timely objected to and since petitioner had exhausted state remedies:

> . . . the case before us squarely presents the issue of whether the rule in Mapp applies in a collateral attack on a pre-Mapp conviction (323 F. 2d at p. 13).

The Court held that *Mapp* should be limited to prospective application and, conscious of the split within the Circuits and among the state courts, observed:

> Ultimately, the solution must come from the Supreme Court. In the meantime, however, it is the obligation of the lower courts to endeavor to reach an authoritative, logical and just result. 323 F. 2d at p. 13.

Chief Judge Tuttle dissented (323 F. 2d at 19).

One further point should be mentioned. The illegal searches in this case occurred on August 24-26, 1958, al-

most a year *after* the illegal searches in *Mapp* on May 23, 1957 (367 U. S. at 644). The instant case and *Mapp* v. *Ohio* parallel the other factually, procedurally and constitutionally. They were about a year apart in the search and trial; the affirmance on appeal was about the same time (Mapp: 3/23/60; Linkletter: 2/15/60); both persons were convicted of crimes apparently wholly unrelated to the original search; both searches admittedly violated the Fourth Amendment; both persons were convicted primarily on illegal evidence seized in the searches. The Fifth Circuit apparently gave no weight to these facts. Petitioner believes that the only real difference between the two cases is that *Mapp* got to the Supreme Court first.

Summary of Argument

I. INTRODUCTION

In the three years since this Court's decision in *Mapp* v. *Ohio*, circuit courts have become hopelessly deadlocked in interpreting whether or not this Court intended *Mapp* to have prospective or retroactive application. Since this Court has applied *Mapp* with limited retroactivity in its decisions in *Ker*, *Fahy*, and *Stoner*, the lower court in the instant case and petitioner herein have defined the word "retroactive" to include only those decisions which became final prior to the decision of *Mapp*, viz: June 19, 1961. While the illegal search in petitioner's case occurred after the illegal search in *Mapp*, petitioner's conviction became final prior to the decision in *Mapp*.

II. THE FIFTH CIRCUIT'S DECISION IS WRONG AND MUST BE REVERSED

(a) *The "Purpose" of Mapp*

The Fifth Circuit's opinion below rests in part on the premise that the "purpose" of the *Mapp* decision is to deter unlawful police misconduct and such purpose would not be served by affording this right, retroactively, to pre-*Mapp* prisoners. Petitioner maintains that this premise as applied by the Fifth Circuit is erroneous, and that the express language of the *Mapp* opinion makes it clear that a primary purpose for the decision is to protect a basic constitutional right not to be convicted on unconstitutional evidence.

(b) *The "Intent" of Mapp*

The Fifth Circuit held that this Court gave no indication of its intent as to whether *Mapp* should be applied retroactively or prospectively. Petitioner contends first, that this Court made it clear in *Mapp* that *Mapp* should be applied retroactively; second, that the post-*Mapp* decisions of this Court applying the exclusionary rule show retroactive application; and, third, that this Court has uniformly given "retroactive" application to other basic constitutional rights as enunciated by this Court.

(c) *Judicial Administration*

The Fifth Circuit held that orderly judicial administration called for prospective application, and more specifically that retroactive application would release presumably guilty prisoners. But the *Mapp* decision and other decisions of this Court make clear that the enforcement of fundamental constitutional rights cannot be sacrificed in the name of orderly judicial administration.

III. THIS CASE MUST BE REVERSED REGARDLESS OF THE DECISION IN THE RETROACTIVE VERSUS PROSPECTIVE CONFLICT

(a) *The Illogical Results*

Petitioner contends that since the petitioner's illegal seizure occurred *after* the illegal seizure in *Mapp*, a refusal to afford to petitioner the constitutional right enunciated in *Mapp* would make such deprivation dependent upon the docket load of the Louisiana appellate court. Petitioner states that this Court could not intend such illogic and injustice to result from the application of its decision in *Mapp*.

(b) *The Constitutional Barrier*

Petitioner contends the decision below must be reversed for the reason that the court below by refusing to protect petitioner's constitutional right to be free from unreasonable search and seizure denied due process under the Fifth Amendment.

ARGUMENT

I.

Introduction

Over three years have passed since this Court rendered its opinion in *Mapp* v. *Ohio*, 367 U. S. 643, holding that illegal evidence obtained in violation of the right to privacy rquirement of the Fourth Amendment is excludable in state prosecution by virtue of the Fourteenth Amendment. *Mapp* finally gave Fourteenth Amendment enforcement to Fourth Amendment rights. This length of time has proved sufficient for federal and state appellate courts to apply the

Mapp rule of exclusion to most of the possible chronological possibilities found in cases tried before June 19, 1961, the date of the *Mapp* decision.

The lower courts generally have defined the problem to be one of retroactive vs. prospective application of *Mapp*. The *Linkletter** opinion illustrates the hopeless deadlock between the various Circuits (and the States). Some four circuits and many legal writers and theorists have joined in the conflict since *Linkletter*.[1]

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* The *Linkletter* opinion, 323 F. 2d 11, is styled "United States ex rel. Linkletter v. Walker" and will be referred herein as "Linkletter" or *United States* v. *Walker*.

[1] The following is a chronological list of the Circuit Court decisions involving the retroactivity, *vel non*, of *Mapp*:

Fourth, Retroactive: *Hall* v. *Warden*, 313 F. 2d 483 (4 Cir. 1963). The *Hall* case was followed in *Walker* v. *Peppersack*, 316 F. 2d 119 (4 Cir. 1963).

Tenth, Prospective: *Gaitan* v. *United States*, 317 F. 2d 494 (10 Cir. 1963).

Fifth, Prospective: *United States ex rel. Linkletter* v. *Walker*, 323 F. 2d 11 (5 Cir. 1963). The *Linkletter* case was followed in *Reynolds* v. *United States*, 324 F. 2d 379 (5 Cir. 1963), where the Fifth Circuit refused to apply *Elkins* v. *United States*, 364 U. S. 206, retroactively to benefit a prisoner convicted on pre-*Elkins* "silver platter" evidence.

Ninth, Retroactive: *People of State of California* v. *Hurst*, 325 F. 2d 891 (9 Cir. 1963).

Third, Undecided: *United States* v. *Rundle*, 327 F. 2d 153 (3 Cir. 1964).

Seventh, Prospective: *Sisk* v. *Lane*, 331 F. 2d 235 (7 Cir. 1964).

Second, Prospective: *United States* v. *Fay*, 333 F. 2d 12 (2 Cir. 1964).

The following is a partial list of legal articles treating the subject of prospective vs. retroactive application:

Wolf, *A Survey of the Expanded Exclusionary Rule*, 32 Geo. Wash. L. Rev. 193 (1963).

Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp* v. *Ohio*, 110 U. Pa. L. Rev. 650 (1962).

It is important to define the terms "retroactive" and "prospective." The Fifth Circuit observed that the *Mapp* decision could not be considered purely "prospective" for the decision itself was applied retroactively to exclude the illegal evidence of the *Mapp* conviction. 323 F. 2d at 13. Furthermore, it cannot seriously be disputed that minimum fairness commands that *Mapp* be given retroactive application to set aside convictions founded on illegal evidence in cases pending on post-trial motions or on appeal at the time of the *Mapp* decision. This Court has resolved this question by applying the exclusionary rule of *Mapp* retroactively to three cases, *Ker*, *Fahy* and *Stoner*, having appeals pending on June 19, 1961.[2]

Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, Duke L. J. 319 (1962).

Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L. J. 907 (1962).

Torcia and King, *The Mirage of Retroactivity and Changing Constitutional Concepts*, 66 Dick. L. Rev. 269 (1962).

Morris, *The End of an Experiment in Federalism—A Note on Mapp* v. *Ohio*, 36 Wash. L. Rev. 407.

Note, 16 Rutgers L. Rev. 587.

[2] In *Ker* v. *California*, 374 U. S. 23 (1963), the arrest was on July 27, 1960 and the case affirmed by the California Court of Appeals on August 29, 1961.

In *Fahy* v. *Connecticut*, 375 U. S. 85 (1963), the trial took place before the decision in *Mapp* but the conviction was affirmed after *Mapp*. *Connecticut* v. *Fahy*, 149 Conn. 577, 183 A. 2d 256 (1962).

In *Stoner* v. *California*, 376 U. S. 483, the search occurred on October 27, 1960 and the California District Court of Appeals affirmed on June 26, 1962, 205 Cal. App. 2d 108, 22 Cal. Rep. 718.

Before the event of the *Ker*, *Fahy* and *Stoner* decisions, most courts having considered the problem applied *Mapp* retroactively to cases on appeal. See, e.g., *State* v. *Smith*, 37 N. J. 481, 181 A. 2d 761 (1962); *Commonwealth* v. *Spofford*, 343 Mass. 703, 180 N. E. 2d 673 (1962); *People* v. *Loria*, 10 N. Y. 2d 368, 223 N.Y.S. 2d 462, 179 N. E. 2d 478 (Ct. App. 1961). But see *Commonwealth* v. *Mancini*, 198 Pa. Sup. 642, 184 A. 2d 279 (1962), where defendant was convicted on the date of the *Mapp* decision and the Pennsylvania Superior Court refused Mapp relief on direct appeal—relief was obtained by the grant of habeas corpus because of the "accident of time," *United States ex rel. Mancini* v. *Rundle*, 219 F. Supp. 549 (D. C. Pa. 1963).

Consequently, since we are only concerned with convictions which became final before the date of the *Mapp* decision, we will follow the example of the Fifth Circuit and "accordingly limit" our use of the terms, "prospective" and "retroactive." 323 F. 2d at 13. Under that definition the circuits are divided four: two: one in favor of prospective application.[3]

It immediately becomes apparent that those cases which became final before June 19, 1961 can be divided into two or perhaps three classes:

—those whose unconstitutional searches and seizures occurred *after* May 23, 1957, the date of the illegal seizure in *Mapp* (367 U. S. at 644);

—those whose unconstitutional searches occurred *before* May 23, 1957, but whose convictions became final *before* June 19, 1961;

—those whose unconstituional searches occurred *before* May 23, 1957, and whose convictions became final *before* May 23, 1957.

Petitioner's case falls in the first group—the unconstitutional seizure in his case occurred after the *Mapp* seizure. The time at which the decision in his case became final depended directly upon the docket load of the Louisiana Supreme Court. Had the Louisiana Court been derelict or tardy in its judicial business petitioner would have fallen into the class protected by *Ker, Fahy* and *Stoner*.[4] An important personal constitutional right should not be extinguished because of such fortuitous event.

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[3] The Fourth and Ninth appear to have held *Mapp* to be retroactive in all situations. The Third applied *Mapp* retroactively to a case on appeal at the time of the *Mapp* decision. The Second, Fifth, Seventh and Tenth have applied the decision prospectively to deny relief. See cases cited in note 1, *supra*.

[4] Cases cited, note 2, *supra*.

II.

The Fifth Circuit's Decision Is Wrong and Must Be Reversed.

In the opinion below, the Fifth Circuit denied to Victor Linkletter a personal constitutional right enunciated in *Mapp*. The right denied was the guarantee to be free from unreasonable searches and seizures. The right is one "basic to a free society," 367 U. S. at 656, and was held in *Mapp* to be "an essential part of the Fourteenth Amendment", 367 U. S. at 657. Nonetheless, the Fifth Circuit refused to enforce this right in favor of Linkletter for the sole reason that he was deprived of the right at a date sometime before the *Mapp* decision.

The Fifth Circuit's opinion seems based on three premises. (1) That the "purpose" of the *Mapp* decision is to deter unlawful police misconduct and such purpose would not be served by affording this right retroactively to pre-*Mapp* prisoners. (2) That this Court gave no indication of its intent toward the application of *Mapp*, leaving the circuits open to devise the basis of its application. (3) That orderly judicial administration calls for prospective application.

Petitioner respectfully submits that all three premises are erroneous, and that there is no justifiable reason to deny the *Mapp*-defined constitutional rights to Linkletter.

(a) *The "Purpose" of Mapp*

Notably the Fifth, Second and Seventh Circuits, in deciding to give only prospective application to the Constitutional Rule of *Mapp*, found that the clear "purpose of the exclusionary rule [was] to enforce the right of privacy as a deterrent," *United States* v. *Walker*, 323 F. 2d 11, 18 (5 Cir. 1963), or that the "principal reason" or "primary

purpose" behind the *Mapp* decision was "to deter police misconduct", *United States* v. *Fay*, 333 F. 2d 12, 17 (2 Cir. 1964) or that the *Mapp* decision was "limited to a deterrent purpose," *Sisk* v. *Lane*, 331 F. 2d 235, at 239 (7 Cir. 1964).

Petitioner has no quarrel with the observation that "deterrence" is one of the "purposes" of the exclusionary rule and a desirable one.[5] Petitioner does maintain that the three circuits are in clear error in focusing exclusive attention on deterrence. This Court's opinion in *Mapp* seemed to petitioner to make as clear as words could express that a primary purpose of *Mapp* was to assure that the individual is afforded due process of law and is not deprived of a personal constitutional right "basic to a free society."

This Court stated in *Mapp* that the right sought to be protected is "no less important than any other right carefully and particularly reserved to the people" 367 U. S. at 656. This Court stated that this right to be spared unconstitutional searches and seizures would be enforced against the states with the same strictness as it is enforced against the Federal Government in the same manner as are enforced the "rights of free speech and of free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession. . . ." 367 U. S. at 656. Failure to so enforce it would cause this right to "stand in marked contrast to all other rights declared as 'basic to a free society.'" 367 U. S. at 656.

Additional evidence that one of the primary purposes of *Mapp* was to enforce in favor of the individual citizen the personal constitutional right to privacy is *Mapp's* reliance

[5] This Court observed in *Mapp*, 367 U. S. at 656, a quote from *Elkins* v. *United States*, 364 U. S. 206, 217, that deterrence, in removing the incentive to disregard the constitutional right, will "compel respect for the constitutional guaranty."

on *Boyd, Weeks* and *Wolf* in defining the nature and scope of the right.[6]

Mapp expressly considered the right as one of "*personal* privacy", 367 U. S. at 657, quoting *Feldman* v. *United States,* 322 U. S. 487, 489, 490, and stating that *the least* this right, coupled with the Fifth Amendment, can "assure in

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[6] See Sections I and II of the *Mapp* decision.

Over seventy-five years ago this Court in *Boyd* v. *United States,* 116 U. S. 616, 630 (1886), noting that "the very essence of constitutional liberty and security" were at stake, held (116 U. S. at 630):

> It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of *personal* security, *personal* liberty and *private* property . . . (Emphasis added).

In *Weeks* v. *United States,* 232 U. S. 383, 392, it was again stated that the effect of the Fourth Amendment is to "forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law" and the use of evidence unconstitutionally seized was a "denial of the constitutional rights of the accused" (232 U. S. at 398). And in *Olmstead* v. *United States,* 277 U. S. 438, 463, this Court observed that "the well-known historical purpose of the Fourth Amendment . . . was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects, and to prevent their seizure against his will."

The personal constitutional nature of the right to privacy was re-emphasized in *Wolf* v. *Colorado,* 338 U. S. 25, 27, 28, where this Court held:

> The security of one's privacy against arbitrary intrusion of the police—which is at the core of the Fourth Amendment—is basic to a free society.

In *Wolf* the Court made it clear that the right to privacy enjoyed no lower constitutional status than other basic constitutional rights; it enjoyed a place alongside the First Amendment guaranties such as freedom of speech, freedom of the press, or the free exercise of religion—this because the right to privacy was a right "implicit in 'the concept of ordered liberty' ". *Wolf* v. *Colorado,* 328 U. S. at 27, citing *Palko* v. *Connecticut,* 302 U. S. 319, 324, 325.

Although this Court, in *Wolf,* made it clear that the right to privacy was "enforceable against the states through the Due Process Clause," 338 U. S. at 27, 28, it refused to give a Fourteenth Amendment privilege to exclude illegal evidence as a "way of enforcing" this basic right. 338 U. S. at 28. As we read the decision, *Mapp* overruled *Wolf* in this regard and held that due process of the

either sphere is that *no man is to be convicted* on unconstitutional evidence" (Emp. added), 367 U. S. at 657. Finally this Court emphasized that "our decision . . . gives to the *individual* no more than that which the Constitution guarantees him" (Emp. added). 367 U. S. at 660.

The *Mapp* decision thus made clear that one of its basic purposes was to "reserve to *all* persons (Emp. added) as a specific guarantee" the "basic" right "to privacy free from unreasonable state intrusion", 367 U. S. 654. Nothing in the *Mapp* opinion suggests that Victor Linkletter should not be afforded this basic right the same as Mapp and others. The opinion below ignores this clear purpose of *Mapp*.

We agree with Judge Marshall's dissent in *United States* v. *Fay, supra,* 333 F. 2d at 23, that the majority of his court "by focussing almost exclusively on a supposed 'purpose' which it attributes to the exclusionary rule has obscured this basic point" that the "right not 'to be convicted on unconstitutional evidence,' is a fundamental ingredient of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States."

(b) *The "Intent" of Mapp*

The Fifth Circuit, in its opinion holding for prospective application, states that the "very *least* that could be said is that the [Mapp] opinion is not clear as to whether it

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Fourteenth required the enforcement of right to privacy against the states by the rule of exclusion, the same way as the right is enforced against the Federal Government. Therefore, *Mapp* made the exclusionary rule "an essential part of the Fourteenth Amendment," 367 U. S. at 657, and gave to citizens a constitutionally enforced right of privacy as against both the Federal and State governments.

We note that this Court through Chief Justice Hughes held long ago that the Fourteenth Amendment's search prohibition should be "liberally construed" in favor of the "individual." *Sgro* v. *United States,* 287 U. S. 206.

should be given retroactive effect."[7] We strongly disagree and state that the *Mapp* opinion is quite clear that this Court intended retroactive effect. This position is strengthened when post-*Mapp* decisions *of this Court* are examined. And it should be remembered that this Court has never allowed a newly enunciated constitutional decision to be applied except with complete retroactivity.

Petitioner realizes the irony in arguing to this court what this court meant in a recent opinion. The intent of that opinion is clearly expressed, however, and Petitioner maintains, with deference, that the Fifth Circuit utterly failed to heed its mandate that the constitutional right of privacy must be enforced indiscriminately, as other such rights, whether the citizen was deprived of it before or after the magic date of the *Mapp* decision.

Footnote 9 of the *Mapp* opinion and its supporting text makes this clear (367 U. S. at 659):

> There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." *People* v. *Defore*, 242 NY, at 21, 150 NE, at 587. In some cases this will undoubtedly be the result.[9] But, as was said in Elkins, "there is

[9] As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. We note, moreover, that the class of state convictions possibly affected by this decision is of relatively narrow compass when compared with *Burns* v. *Ohio*, 360 U.S. 252, 3 L ed 2d 1209, 79 S.Ct. 1164, *Griffin* v. *Illinois*, 351 U.S. 12, 100 L ed 891, 76 S.Ct. 585, 55 ALR 2d 1055, and *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116, 100 L ed 126, 76 S.Ct. 223. In those cases the same contention was urged and later proved unfounded. In any case, further delay in reaching the present result could have no effect other than to compound the difficulties.

[7] *United States* v. *Walker*, note 1, *supra*, 323 F. 2d at 15.

another consideration—the imperative of judicial integrity." 364 U.S. at 222. The criminal goes free, if he must, but it is the law that sets him free.

To what could the footnote and supporting text refer than to problems concerning the effect of releasing pre-*Mapp* prisoners? If this Court intended *Mapp* to be only prospectively applied, the phrase ". . . the class of state convictions possibly affected by this decision" would not make sense—there would be no *class* of *convictions* affected by the decision. Likewise the comparison with *Burns, Griffin* and *Herman*, and particularly *Griffin's* retroactivity, would be a useless act—these three decisions could "affect" state convictions "only if they were given retroactive effect."[8]

We observe that this Court significantly did not limit *Mapp* to future operation "as it might have done."[9]

Mr. Justice Harlan in his dissent (joined by Justices Frankfurter and Whittaker) discussed the "untoward practical ramifications respecting state cases long since disposed of in reliance on *Wolf* . . ." 367 U. S. at 676. This dissent shows beyond dispute that these three Justices considered the majority opinion to have retroactive application.

We also note Justice Harlan's dissent in the per curiam disposition of the series of cases beginning with *Pickelsimer* v. *Wainwright*, —— U. S. ——, 11 L. ed. 2d 41, 42 (1964), where he again pointed to the retroactive nature of *Mapp*:[10]

[8] Judge Marshall, dissenting in *United States* v. *Fay, supra*, 333 F. 2d at 23.

[9] *Hall* v. *Warden, supra*, 313 F. 2d at 496. It has been noted that it could "be argued with a good deal of force" that this "void in the opinion" clearly "intended retroactive effect." *Torcia & King*, note 1, *supra*, at 275, 276.

[10] We note that this dissent appeared after the Fifth Circuit's opinion below.

> When this Court is constrained to change well-established constitutional rules governing state criminal proceedings, as has been done here and in other recent cases . . . it seems to me that the question whether the States are constitutionally required to apply the new rule *retrospectively*, which may well require the reopening of cases long since finally adjudicated in accordance with then applicable decisions of this Court, is one that should be decided only after informed and deliberate consideration. . . . Nor do I believe that the circumstance that Gideon was decided in the context of a state collateral proceeding rather than upon direct review, as were the new constitutional doctrines enunciated in Mapp and Ker, forecloses consideration of the *retroactivity* issue in this instance. (Emp. added.)

The clearest "proof" of retroactive application next to the language of the *Mapp* opinion is "in the pudding" and we refer to *Ker, Fahy* and *Stoner*.[11] All three cases were pre-*Mapp* convictions, and this Court retroactively applied the *Mapp* exclusionary rule to each to test the constitutionality of alleged illegally seized evidence. The seizure and the trial in Petitioner's case, like *Ker, Fahy* and *Stoner*, took place before the decision in *Mapp*. The only temporal difference between the four cases was that the latter three were pending on appeal on the date of the *Mapp* decision, June 19, 1961:

	Illegal Seizure	*Affirmance Date*
Ker—	July 27, 1960	October 25, 1961
Fahy—	February 1, 1960	June 26, 1962
Stoner—	August 27, 1960	June 26, 1962
Linkletter—	August 16, 1958	February 15, 1960
Mapp—	May 23, 1957	March 23, 1960

[11] Note 2, *supra*.

The retroactive applications of *Ker*, *Fahy* and *Stoner* must dictate similar application to Linkletter.[12] Otherwise, a premium is placed on judicial delay or tardiness—Linkletter would have been benefited had the Supreme Court of Louisiana been further behind on its docket.

In addition to the *Mapp* decision and her offspring, what do the decisions state in regard to "other basic rights secured by the Due Process Clause" which *Mapp* held are *"enforceable in the same manner and to like effect"*, 367 U. S. at 660 (Emp. added)? In other words, how has this Court enforced "other basic rights" in factual situations occurring at a date before the right was defined by this Court? We submit that other than the decision of the Fifth Circuit and its three sisters there have been no exceptions to the rule that constitutionally protected rights are enforced in favor of a citizen deprived of such right, irrespective of the fact that such deprivation may have occurred before or after such right was defined. The following are a few examples of such enforcement:

Eskridge v. *Washington*, 357 U. S. 214, granted to a prisoner serving under a 1935 conviction the right not to be deprived of appellate review because of poverty, and thereby applied retroactively the 1956 decision of *Griffin* v. *Illinois*, 351 U. S. 12, which defined such right. This was done over the strong "prospective" argument of respondent[13] and over the dissent of Justices Harlan and Whittaker that the "Griffin case, decided in 1956, should not be applied to this conviction occurring in 1935. . . ." 357 U. S. at 216.

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[12] *Fahy* and *Stoner* were not decided at the time the Linkletter case was written. However, the court in Linkletter cited and promptly distinguished *Ker*. 323 F. 2d at 13.

[13] The State of Washington argued as the first proposition in its brief that "The decision in *Griffin* v. *Illinois* should be limited to a prospective application." Brief for Resp. p. 12.

Last year the Court again indicated that *Griffin* would have been applied retroactively, this time to a 1941 conviction, but for the death of the reporter, among other things. *Norvell* v. *Illinois*, 373 U. S. 420 (1963).[14] Mr. Justice Goldberg joined by Mr. Justice Stewart in dissenting observed (373 U. S. at 425):

> Griffin was a constitutional decision vindicating basic Fourteenth Amendment rights and is no more to be restricted in scope or application in time than other constitutional judgments.

Recently this Court reversed a 1959 plea-of-guilty conviction on the basis of the 1963 constitutoinal right to counsel requirements of *Gideon* v. *Wainwright*, 372 U. S. 335. *Doughty* v. *Maxwell*, 376 U. S. 202. And in the past year this Court has entered dozens of per curiam orders reversing pre-*Gideon* convictions, orders which obviously enforce retroactively the right to counsel requirements of *Gideon*.[15] It is significant that the Circuits and some state courts have had no trouble in applying *Gideon* retroactively.[16]

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[14] In *Norvell* petitioner's 1941 transcript was unavailable in 1961 because of the death of the reporter. Norvell had an attorney and did not seek appeal after trial. The Court held that the state did not have to furnish a record under these circumstances. Justices Goldberg and Stewart dissented on the grounds that the Illinois Supreme Court interpreted *Griffin* prospectively and not retroactively in the sense that *present* and not *past* financial barriers to appeal are protected.

[15] E.g.: On April 22, 1963, this Court vacated and remanded "for further consideration in the light of Gideon v. Wainwright" some eighteen cases involving claims of no counsel in pre-*Gideon* convictions, 372 U. S. 766, 770, 773-782; again on June 17, 1963, another eleven cases were similarly reversed, 374 U. S. 488, 494; and on October 14, 1963 eleven more, —— U. S. ——, 11 L. Ed. 2d 41, 42.

[16] For example see: *Perez* v. *St. of N. Y.*, 223 F. Supp. 336 (S. D. N. Y. 1963); *U. S. ex rel. Craig* v. *Myers*, 220 F. Supp. 762 (E. D.

Of particular significance is the posthumously published opinion of the late Judge Clark, adopted as the opinion of the Second Circuit, sitting *en banc*, in the case of *U. S.* v. *LaVallee*, 330 F. 2d 303, 312 (1964). The opinion was prepared prior to this Court's per curiam decision in *Doughty* v. *Maxwell, supra*, 376 U. S. 202. The question, of course, was whether a pre-*Gideon* defendant, convicted without counsel on a plea of guilty, should receive *Gideon* relief retroactively. Judge Clark stated:

> We do not deal here, however, with considerations of *res judicata* and vested rights, but with the question whether, consonant with our society's conceptions of due process and general constitutional law, we could deny the constitutional right enunciated in Gideon to those who happened to be tried before the decision was handed down. Thus to hold would be to assign a lower constitutional status to pre-Gideon prisoners who were denied the right to counsel, a right so 'fundamental and essential to a fair trial' that it is made obligatory upon the States by the Fourteenth Amendment to the United States Constitution; a right that has been characterized by the Court as a 'basic minimal' right vouchsafed by the Constitution, Rideau v. Louisiana, 373 U. S. 723, 726, 83 S. Ct. 1417, 10 L. Ed. 2d 663. There is no question that such prisoners were subjected to an unfair trial. The only question is whether we will deny them relief. We do not believe that our constitutional standards would permit such a denial.

Pa. 1963); *Jones* v. *Cunningham*, 319 F. 2d 1, 5 (4 Cir. 1963); *Striker* v. *Pancher*, 317 F. 2d 780 (6 Cir.—Dictum); *Johnson* v. *Crouse*, 224 F. Supp. 864, 867 (D. C. Kan. 1964). See *Gideon* v. *Wainwright*, 153 So. 2d 299 (Fla. 1963) on remand.

Further significant evidence that this Court intended retroactive applications for pre-*Mapp* situations are the recent decision of *Fay* v. *Noia*, 372 U. S. 391 (1963), dispensing with some of the preservation of federal question requirements of *Daniels* v. *Allen*, 344 U. S. 443 (1953), and the companion case of *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963), holding, *inter alia*, that the prisoner need not have asserted his constitutional rights in the state hearing if he "was unaware of the significance of relevant facts." These cases certainly open the procedural doors for pre-*Mapp* prisoners to challenge the constitutionality of the evidence which convicted them.[17] Likewise, we believe that cases such as *Reck* v. *Pate*, 367 U. S. 433, holding the release of a 1937 prisoner because of involuntariness of a confession, are material to the instant case when standards set forth in recent cases are used retroactively to test the confession.[18]

The many decisions of this Court, many decided before the opinion below, even in the absence of the *Mapp* language and the three subsequent *Mapp* decisions, clearly indicate by uniform precedent this Court's intent to apply retroactively all Fourteenth Amendment rights so that no

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[17] See Wolf, 32 Geo. Wash. L. Rev., note 1, *supra*, at 231, 232.

[18] Judge Marshall dissenting in *U. S.* v. *Fay*, note 1, *supra*, 333 F. 2d at 24, noted that: "In Reck v. Pate, 367 U. S. 433, the court ordered the release of Reck, a prisoner convicted in 1937, when it found that the circumstances of obtaining a confession were inherently coercive in the light of such cases as *Blackburn* v. *Alabama*, 361 U. S. 199 (1960); *Payne* v. *Arkansas*, 356 U. S. 560 (1958); *Fikes* v. *Alabama*, 352 U. S. 191 (1957) and *Turner* v. *Pennsylvania*, 338 U. S. 62 (1949), all of which were decided many years after Reck's trial. Indeed, the District Court which held a hearing on Reck's petition recognized, that under the present-day standards expounded in the above and other cases, the confession would have to be excluded, but declined to apply those cases retroactively. See United States ex rel. Reck v. Ragen, 172 F. Supp. 734, 747 (N. D. Ill. 1959)."

citizen will suffer an arbitrary deprivation of his constitutional rights.

The holdings of the Circuits prospectively applying *Mapp* have effectively assigned to Linkletter and others like him "a lower constitutional status." *United States* v. *LaVallee*, *supra*, 330 F. 2d at 312. The effect of these holdings is a refusal to enforce a fundamental constitutional right in favor of a citizen because the state deprived him of the right before this Court had declared such right.

The decisions of these Circuits which apply *Mapp* only prospectively frustrate the *Mapp* decision and its designed "intent" or "purpose" in another way. This Court examined at length the "double standard recognized until today" which helped create the "needless conflict between state and federal courts", and noted that the "essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts." 367 U. S. at 657-658. The opinion rang with the necessity of uniformity of treatment of persons subjected to unreasonable searches and seizure. The Fifth Circuit and other circuits applying *Mapp* prospectively have now introduced a new lack of uniformity and a new arbitrary difference as between pre-*Mapp* and post-*Mapp* prisoners.

The decision below thus violates the spirit of the *Mapp* decision which sought to give uniform, logical application of the protections of the Constitution, necessary in the true administration of justice.

(c) *Judicial Administration*

In the opinion below, the Fifth Circuit, supported by several law review articles[19] agreed that perhaps retroactive

[19] The articles cited by the Court include the Yale and Rutger's notes, and the Bender and Traynor articles, note 1, *supra*.

application would "place at the disposition of the guilty an extraordinary remedy designed to insure the protection of the innocent [which] would be to invite needless disruption in the administration of justice." [20] And the Court stated (323 F. 2d at 19):

> We conclude that whatever slight deterrent effect, if any, *Mapp* might have if applied retroactively is insufficient to warrant the release of all of these presumably guilty prisoners.[11]

Footnote 11 to the above holding reads (333 F. 2d at 19):

> It should be pointed out that this decision is not merely based on the great administrative burden which would be placed on the courts should *Mapp* be applied retroactively, for prisoners as well as tort claimants have a right to crowd court dockets. Instead, this decision is based on the fact that such litigation would fail to serve the purpose for which the right was created.

This Court clearly crossed this bridge of releasing "all of these presumably guilty prisoners" [21] in the *Mapp* decision. This Court stated:

> There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the con-

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[20] *United States* v. *Walker*, 323 F. 2d at 19, quoting Traynor, Duke L. J. at 341, 1962, note 1, *supra*.

[21] The record shows that Victor Linkletter has vigorously maintained his innocence. We will not join issue with the observation that innocent persons were never convicted under the pre-*Mapp* rule because such is not necessary to this appeal. We will observe the ironical fact, however, that apparently neither Miss Mapp nor Victor Linkletter was convicted of the crime which was the subject of the illegal search—they were both innocent of the originally suspected offense.

stable has blundered." People v. Defore, 242 NY, at 21, 150 NE, at 587. In some cases this will undoubtedly be the result.[9] But, as was said in Elkins, "there is another consideration—the imperative of judicial integrity." 364 U. S. at 222. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

The Fifth Circuit's quoted administrative holdings are completely opposed by this portion of the *Mapp* decision. Not only in *Mapp*, but in other decisions this Court has made it clear that neither enforcement of fundamental constitutional rights nor the respect for judicial integrity can yield to independent evidence of guilt.[22]

Obviously this Court was not impressed with the "wholesale release" argument in its rulings on pre-*Gideon* cases and obviously the *Gideon* decision will affect many more prisoners than *Mapp*. The same observation has been made of *Fay* v. *Noia*, 372 U. S. 391.[23]

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[22] See for example, *Rogers* v. *Richmond*, 365 U. S. 534; *Haynes* v. *Washington*, 373 U. S. 503; *Reck* v. *Pate*, 367 U. S. 433.

[23] Judge Marshall, dissenting in *United States* v. *Fay*, note 1, *supra*, at 26.

Although our position is that a respect for the Constitution requires a new trial for Linkletter and others similarly situated, we cannot agree with the Fifth Circuit's fear of prisoner release. Rather, we submit that the number of cases which ultimately may result in new trials under retroactive application is infinitesimally small. See *Wolf*, note 1, *supra*, at 217, 233; *Torcia and King*, note 1, *supra*. District Judge Tyler in *United States* v. *Fay*, 225 F. Supp. 677 (S. D. N. Y. 1963), rev'd, 333 F. 2d 28, observed that the opening of the prison gates argument required a "pessimistic appraisal of the methods of police and prosecutors."

We submit that the Fifth Circuit (and the legal articles cited by the Fifth Circuit) erroneously failed to recognize the foundation of the *Mapp* exclusionary rule as being a personal fundamental constitutional right *of an accused*—rather the Court and its supporting articles treat the *Mapp* constitutional right as though it were a rule of evidence, or at most a statutory command.

Victor Linkletter has admittedly been denied a fundamental constitutional right by the State of Louisiana. The Fifth Circuit refuses to enforce that right in his favor. That decision must be reversed and the "individual", Victor Linkletter, must be given "that which the Constitution guarantees him." 367 U. S. at 660.

III.

This Case Must Be Reversed Regardless of the Decision in the Retroactive Versus Prospective Conflict.

(a) *The Illogical Results*

This Court did not intend *Mapp* to be applied to give illogical results—its constitutional relief should not depend upon "trivial events." [24]

Assuming for argument only that this Court did not intend the constitutional right defined in *Mapp* to be applied to all pre-*Mapp* cases, the right surely must be afforded to Linkletter who was deprived of his right *after* Miss Mapp

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[24] *United States* v. *LaVallee*, 330 F. 2d 303, 310, note 4, stating: ". . . Do the rights of prisoners tried during the summer of 1961 depend on whether they were tried during, before, or after Gideon's trial—or his arrest—or his sentencing? Or perhaps the alleged date of the crime is critical. Against such casuistry we hasten to add our simple point: Constitutional rights should not depend on arcane logic or trivial events."

was deprived of hers. We submit that *any* withholding of the *Mapp* right to pre-*Mapp* prisoners could be based only on the exigency of the case of the fortuity of time and would result in a capricious deprivation of the right—for stronger reasons—if the constitutional application is withheld to Linkletter, his rights have become dependent upon the docket load of the Louisiana courts. A slower docket would have meant that Linkletter would have fallen within the factual situations of *Ker, Fahy* and *Stoner*. This fact was not recognized, or was ignored, by the Fifth Circuit. If there must be a cut-off date for *Mapp's* retroaction, the only logical date would be where all "relevant" factors happened before the seizure in *Mapp*. Otherwise, as observed in *Hall* v. *Warden*, 313 F. 2d at 496:

> . . . is the conviction so impregnable to collateral attack that the law is justified in exacting the death penalty from Hall because his trial and appeal were pushed along while it is possible that others who may have obtained delays may be tried by a different yardstick?

We do not think this Court intended *Mapp* to be construed to result in a lower decision holding that "although an illegal search in Ohio vested the victim in 1957 with a constitutional privilege to exclude, such a search in . . . [Louisiana] did not vest the victim with such a privilege in 1959, and that although a trial in Ohio in which illegally obtained evidence was admitted was constitutionally vitiated, a later trial in . . . [Louisiana] in which such evidence was admitted was not constitutionally vitiated." [25]

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[25] *People of State of California* v. *Hurst*, note 1, *supra*, 325 F. 2d 891, 895.

(b) *The Constitutional Barrier*

Notwithstanding this Court's language in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 374 (1940), and *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364, we believe that a very serious constitutional barrier prevents the selective or prospective application by the judiciary of a personal constitutional right. Neither *Chicot* nor *Sunburst* involved or discussed the judicial withholding of the benefit of personal constitutional rights from an individual citizen. The distinction is clear and, we submit, basic. We challenge respondent to cite a case where this Court has even intimated, much less held, that a newly defined constitutional right (or remedy) should be the subject of selective, prospective application. Rather, as has been shown the cases from this Court enforcing constitutional rights are unanimous in retroactive application. We believe and submit that the decision of the Fifth Circuit, refusing to apply a constitutional right, itself denies Petitioner the right of Due Process under the Fifth Amendment.

CONCLUSION

Petitioner respectfully requests this Court to enter its decision, reversing the opinion below and afford to Petitioner his long-denied Constitutional rights defined in *Mapp* v. *Ohio*.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have served a copy of the foregoing brief on Honorable Jack P. F. Gremillion, Attorney General of the State of Louisiana, by mailing such copy, postage prepaid, to him, addressed to him at State of Louisiana, State Capital Building, Baton Rouge, Louisiana, the 1st day of September, 1964.

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No. 95

In the Supreme Court of the United States

OCTOBER TERM, 1964

VICTOR LINKLETTER,

Petitioner,

v.

VICTOR G. WALKER, Warden, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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---

BRIEF FOR RESPONDENTS

May it please the Court:

The only issue before this Court is whether the decision of *Mapp v. Ohio*, 367 U.S. 643, should be given retroactive application to a State court conviction which became final prior to the *Mapp* decision or does the *Mapp* decision only have prospective application, i.e., those cases which are on appeal at the time of the *Mapp* decision on June 19, 1961.

SUMMARY OF ARGUMENT

The *Mapp* decision is to be only given prospective

application as this Court had decided that the exclusionary rule set forth in *Weeks v. U.S.* 232 U.S. 383, was not applicable to the States in State Court proceedings in the case of *Wolf v. Colorado*, 338 U.S. 25. In cases where this Court has recognized a rule which is of constitutional origin but has raised a procedural bar which denies the urging of the right in a criminal proceeding and the bar is later removed by this Court, the effect of the change should be interpreted under the more modern view as enunciated by Mr. Justice Cardozo and the legal realists, in that judges exercise a law-creating function, although, of course subject to the limitations of unreasonable "judicial legislation." (See 71 Yale L. J. 907, 911 (1962)) and reject the Blackstonian view that a court does not pronounce a new law but maintains and expounds the old and that when a decision has been overturned, the first one was merely evidence of the law, which had turned out to be erroneous.

ARGUMENT

This Court in the *Mapp* case did not give a clear indication as to whether the exclusionary rule enunciated therein should be given either a prospective or retrospective application. There have been six occasions in which this issue has been directly presented to six different U. S. Circuit Courts of Appeal, and four Circuit Courts have held that in State court convictions which have become final prior to the *Mapp* decision the exclusionary rule would be applied prospectively and that the remaining two held that it would be given retroactive application.

The Fifth Circuit Court of Appeal, in the case now before the Bar, rejected the traditional Blackstonian view that the Court merely finds the law which always has been there, and that prior overturned decisions were merely evidence of the law, but applied the more modern view which had been enunciated by Mr. Justice Cardozo and the legal realists.

It is suggested, upon examination of the *Wolf v. Colorado* case, supra, that this Court recognized that the *Weeks* rule, which is that evidence illegally obtained may not be used against a defendant, was of constitutional origin and the Court decided that the exclusionary rule would not be imposed upon the States as "an essential ingredient of the right." (338 U.S. at Page 27-29).

The Court in *Mapp* added the exclusionary rule to the right of privacy which had been recognized in *Wolf* for the specific purpose of enforcing the right of privacy embodied in the Fourth Amendment, as the Court felt that to allow the invasion of privacy by State officers would be to permit that right to remain an empty promise.

The sole purpose enunciated above creates a deterrent against State officers in conducting illegal searches, that being the sole purpose of the Mapp decision.

This Court recognized that the exclusionary rule was separated from the basic right to privacy in the *Mapp* case which is set forth as follows:

> "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.

> Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *Elkins v. United States*, supra, at 217." 367 U.S. at 656, 81 S. Ct. at 1692, 6 L.Ed. 2d 1081.

The writers have recognized that the purpose of the exclusionary rule is that of a deterrence. See Traynor, "*Mapp v. Ohio* at Large in the Fifty States" 1962 Duke L. J. 319, 320, 341, 71 Yale L. J. 907, 942 (1962).

The rule was not imposed because of the inherent unreliability of the evidence illegally seized but only as a deterrence and such being the case, this Court, in determining whether the *Mapp* case should be given retroactive or prospective application, should ask if the deterrent effect would be fostered if every State conviction which was based upon illegally obtained evidence was overturned. It is the respondents' contention that it would not. It is enough that the State officer know that if they now commit an unlawful search and seizure the evidence so secured will be excluded under the ruling of the *Mapp* case.

Petitioner contends that this Court has applied the exclusionary rule of *Mapp* retroactively to three cases, *Ker v. California* 374 U.S. 231, *Fahy v. Connecticut* 375 U.S. 85 and *Stoner v. California* 376 U.S. 483. An examination of these cases reveal that none of them were final judgments prior to the *Mapp* decision. It is submitted that the Court was applying the law of the land at the time of or before final judgment as was

stated by Chief Justice Marshall in *United States v. Schooner Peggy* 5 U.S. 102 (1801).

The Court could also have relied upon the principle that either or all of these cases could have been presented to the Court in the same manner as the *Mapp* case and that each would have been decided as *Mapp* was. Therefore, the application of the exclusionary rule in these cases are no guide post by which it can be said that the rule of *Mapp* is to be applied retroactively.

The petitioner further likens the application of the case of *Griffin v. Illinois*, 351 U. S. 12, in *Eskridge v. Washington*, 357 U.S. 214 to the rule of the *Mapp* case. The Griffin case held that an indigent defendant was entitled to a free transcript in order that he may perfect an appeal. The *Griffin* case was held to apply retroactively in the *Eskridge* case. The rule of the *Griffin* case, as stated by the Fifth Circuit Court of Appeal, provides a fairness of procedure. Further, the Griffin rule would possibly prevent the innocent from conviction.

Petitioner also analogies the rule of the case of *Gideon v. Wainwright* 372 U.S. 335 (1963) which gives the Sixth Amendment's guaranty of right to counsel to State defendants. The Gideon rule is one of those constitutional guaranties which go to the very essence of fair trial. It has not been limited to a deterrent purpose as Mapp. (See *Sisk v. Lane* 331 F.2d 235 (1963).

Neither the *Griffin* case, supra, nor the *Gideon*

case, supra, overruled a previous decision. The States should be able to rely upon the law of the land as expounded by this Court until such time as the Court overrules its previous decision. The *Mapp* case is one that is indeed unusual.

CONCLUSION

The rule of the *Mapp* case should be restricted to prospective application only, and that the judgment of the Fifth Circuit Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE

I hereby certify that I have served a copy of the foregoing brief on Truman Hobbs and Euel A. Screws, Jr., attorneys of record for Victor Linkletter, by mailing such copy, postage prepaid, to them at their address at 444 South Perry Street, Post Office Box 347, Montgomery, Alabama.

Baton Rouge, Louisiana, this____day of September, 1964.

TEDDY W. AIRHART, JR.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 95

VICTOR LINKLETTER

Petitioner,

vs.

VICTOR G. WALKER, Warden of
Louisiana State Penitentiary, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, *AMICUS CURIAE*

Questions Presented

1. Do prisoners presently in custody pursuant to criminal judgments that were considered final before the decision in *Mapp* v. *Ohio* have a constitutional right to have their cases reviewed on the basis of *Mapp*?

2. Does every change in conceptions of fundamental constitutional rights entail a fundamental right to re-examination of previously closed cases to determine whether the newly defined right was accorded in the past?

Interest of *Amicus*

The National District Attorneys Association is an interstate organization of local prosecutors, devoted to improving the quality of law enforcement in the states. The questions presented in the instant case have been answered in the negative by every state court that has treated them, and the Association believes that overturning these decisions would needlessly and harmfully disrupt the administration of justice throughout the nation. Accordingly, the Association files the instant brief, with the consent of the parties; another brief, identical in material respects, will be filed in the companion case, *Angelet* v. *Fay*, No. 578, October Term, 1964. Pursuant to the gracious permission of the Court and consent of the parties, counsel representing *amicus* will present oral argument on behalf of respondent in the instant case, and in *Angelet*.

Summary of Argument

The evolution of the exclusionary rule of *Mapp* v. *Ohio* [367 U. S. 643 (1961)] is dramatic proof of Holmes's teaching that change is the law of life and the life of the law. In two decades, the exclusion of unlawfully seized evidence was transformed from a judge-made rule of evidence, freely adopted by some states, into a basic right, binding on all states by authority of the Fourth Amendment. This metamorphosis into a right now deemed "fundamental" to criminal justice does not, however, imply a "fundamental right" to reopen cases that were disposed of at an earlier state of the development. It is false to conceive of a new right, declared in a case that overrules a prior decision, as always existing. Further, the history of the exclusion-

ary rule up to the decision in *Mapp* v. *Ohio* shows that the prospect of retroactivity played no part in the evolution of the rule, and would have inhibited that development. Unanimous state holdings after *Mapp*, supported by decisions in the great majority of the federal circuits, demonstrate that the retroactivity sought by petitioner is not deemed basic to our concepts of justice, and that continuing the incarceration of pre-*Mapp* prisoners without reexamining their cases is not "custody in violation of the Constitution" [see 28 U. S. C. §2241].

Moreover, absent here are the reasons for adopting retroactivity in situations in which new constitutional rights have been applied to previously closed cases, such as the right to perfect an appeal regardless of indigency, to have counsel at trial, and to challenge a confession in the absence of the jury. The reasoning of those decisions forbids present reliance on the validity of prior judgments. In each instance, unlike *Mapp*, the defendant never had a fair trial of issues that were always in the case, including guilt or innocence, and deprivation of constitutional rights that were announced prior to trial. By vacating the judgment, fair trial can be restored. However, the object of the *Mapp* decision, past police misconduct, cannot be corrected by retroactivity. In short, constitutional principles leave this Court a choice whether to apply *Mapp* retroactively.

This choice should be determined by the effects of such a holding. Serious harms to the administration of justice, to the detriment of defendants with more important interests, counsel against retrospective application of *Mapp*.

The evils of retroactivity derive from its enormous scope, and the complexity of the procedures for its implementation. Countless past cases would be subject to cumbersome re-examination; in states that had no exclusionary rule before *Mapp*, in states whose application of exclusion differed from present federal standards, and in the federal jurisdiction. A requirement of reviewing these thousands of cases to determine whether the subsequently announced right of exclusion was "violated" would place an intolerable burden on the improving administration of justice. At a time when the attention of judges, defense lawyers, police, and prosecutors is turned to the urgent present and future application of the profound recent changes in criminal law, retroactivity of *Mapp* would interfere with these important tasks by requiring review of less pressing claims.

Retroactivity of the exclusionary rule, imposed because of the false assumption that any "fundamental" right is retroactive, would also require continuous reopening and re-examination of judgments hereafter, with every future change in the prevailing interpretation of specific "fundamental" Fourth Amendment rights. The continuing evolution of the content of the Fourth Amendment, of which the development of the exclusionary rule is only one aspect, would be impaired by the introduction of this extraneous factor. Pragmatic, day-to-day examinations of the many open constitutional questions that remain in the field of search and seizure should not be inhibited by the unsettling prospect of automatic application of new standards to previously closed cases.

ARGUMENT

There is no absolute right to retroactive application of constitutional decisions. In judging whether *Mapp* v. *Ohio* is retroactive, the Court should consider that reopening and re-examining countless closed cases to determine at which past trials unlawfully seized evidence was elicited would impair the administration of justice, now and in the future, to the detriment of other defendants with more urgent claims.

A. Constitutional Doctrines Leave This Court a Choice Whether to Apply *Mapp* Retroactively.

1. The evolution of the exclusionary rule into a constitutional right shows that a new fundamental right is distinct from an alleged "fundamental right" to reopen previously closed cases thereunder.

The issue in this case is whether *Mapp* v. *Ohio* [367 U. S. 643 (1961)] is "retroactive": whether because of *Mapp* "closed" cases, in which the judgments of guilt were rendered and the appeal exhausted before the date of the *Mapp* decision, must now be reopened, and examined under current Fourth Amendment principles. Thus, the concept of retroactivity involved here does not include the relatively few cases in which the judgment of conviction was rendered before, but review on appeal was pending or available at the time of, the *Mapp* decision. In such cases, *Mapp* has universally been held to govern, pursuant to the practice of applying newly declared law to matters that are still in the appellate process [see *United States ex rel. Carafas* v. *LaVallee*, 334 F. 2d 331 (2d Cir. 1964), *appeal pending; United States ex rel. Campbell* v. *Rundle*, 327

F. 2d 153 (3rd Cir. 1964); *Thompson* v. *State*, 132 So. 2d 386 (Ala. 1961); *State* v. *Hanna*, 191 A. 2d 124 (Conn. 1963); *State* v. *Del Vecchio*, 182 A. 2d 402 (Conn. 1962); *State* v. *Nelson*, 196 A. 2d 52 (N. H. 1963); *State* v. *Pina*, 383 P. 2d 167 (Ariz. 1963); *Commonwealth* v. *Spofford*, 180 N. E. 2d 673 (Mass. 1962); *Commonwealth* v. *Jacobs*, 191 N. E. 2d 873 (Mass. 1963)], although certain appellate courts, including this Court, require adequate objection or other fact on the record to preserve the question for review [see *Ker* v. *California*, 374 U. S. 23 (1963); *Stoner* v. *California*, 376 U. S. 483 (1964); *Fahy* v. *Connecticut*, 375 U. S. 85 (1963); *People* v. *Loria*, 129 N. E. 2d 478 (N. Y. 1961); *People* v. *Friola*, 182 N. E. 2d 100 (N. Y. 1962); *State* v. *Valentin*, 174 A. 2d 737 (N. J. 1961); *State* v. *Smith*, 181 A. 2d 761 (N. J. 1962), *cert. denied* 374 U. S. 835 (1963); *Belton* v. *State*, 178 A. 2d 409 (Md. 1962); *Shorey* v. *State*, 177 A. 2d 245 (Md. 1962), *cert. denied* 371 U. S. 928 (1962); *Commonwealth* v. *Raymond*, 194 A. 2d 150 (Pa. 1963); *Commonwealth* v. *Richards*, 182 A. 2d 291 (Pa. Super. 1963); *Ewing* v. *State*, 116 N. W. 2d 7 (Neb. 1962); *cert. denied* 375 U. S. 876 (1963)]. The decision whether *Mapp* should apply to previously closed cases, on the other hand, involves far more complex and challenging questions as to the meaning of the judicial process.

As the decisions below and respondents' briefs in this case and *Angelet* v. *Fay*, No. 578, October Term, 1964, demonstrate, the issues cannot be disposed of by a simple holding that *all* constitutional decisions that overrule prior cases are retroactive. It would be meaningless to declare that the new constitutional right of exclusion that was promulgated for the first time in 1961 in *Mapp* always ex-

isted, notwithstanding the express holding to the contrary in 1949 in *Wolf* v. *Colorado* [338 U. S. 25 (1949)]. Similarly, it would be a distortion of the development of the exclusionary rule into a constitutional right to conclude that the status of "basic" right automatically means retroactivity. The following review of the emergence of the constitutional rule of exclusion shows that the growing perception of a need for a particular right in present criminal procedure is distinct from a felt necessity of reopening old cases because of the change in standards.

The exclusion of unlawfully seized evidence was introduced to American jurisprudence in Iowa [*State* v. *Sheridan*, 96 N. W. 730 (Ia. 1903)], and several years later this Court applied the rule to federal courts [*Weeks* v. *United States*, 232 U. S. 383 (1914)]. Thereafter, while Iowa abandoned the rule, and twenty-eight other states expressly rejected it, eighteen voluntarily adopted exclusion [see appendix in *Wolf* v. *Colorado*, 338 U. S. 25, 33-39 (1949)]. Thirty-five years after *Weeks*, in *Wolf* v. *Colorado*, the Court held that the Fourteenth Amendment makes binding on the states the right to privacy that is at the "core" of the Fourth Amendment, but the Court's survey of the state decisions, and the availability of other remedies, convinced the Court that exclusion was not "basic to a free society." Eleven years later, however, in *Elkins* v. *United States* [364 U. S. 206 (1960)], the Court's new census of state decisions showed that several states had adopted the rule after *Wolf* [*id.* at 218-221, 224-234 (1960)], and that the "movement towards the rule of exclusion has been halting but seemingly inexorable" [*id.* at 219]. This rationale contributed to the overruling of the "silver platter" doctrine in *Elkins*. The evolution of the exclusionary rule

was completed the next year; in *Mapp* v. *Ohio*, the Court referred extensively to *Elkins* and the shift in state law, and concluded that the "factual considerations" in *Wolf* were now absent [367 U. S. at 651-653, 660], and that exclusion was now fundamental to American criminal procedure.

It is questionable whether the "impressive," "inexorable" experience of the states [see *Elkins* v. *United States*, *supra* at 218-219] that adopted exclusion would have occurred if the state courts and legislatures had contemplated that by contributing to the "fundamental" quality of the rule they would support the drastic requirement, proposed by petitioner here, that all past cases be reopened for scrutiny under the new right. California, whose adoption of the *Weeks* rule in 1955 was cited by this Court in *Mapp* as evidence of its necessity [367 U. S. at 652], might have decided otherwise, since the California exclusionary rule was not applied retrospectively [see *Collins* v. *Webb*, 133 F. Supp. 877 (N. D. Cal. 1955); *People* v. *Martinez*, 302 P. 2d 643 (Cal. App. 1956)]. Similarly, the statutory rule enacted in Rhode Island, which this Court referred to as part of the "significant" experience of the states, was limited to prospective operation [see *State* v. *Hillman*, 125 A. 2d 94 (R. I. 1956)]. Further, *Mapp* itself was uniformly denied retroactivity by the state courts, including those that voluntarily adopted exclusionary rules before *Mapp*.

The retroactivity proposed in the instant case was rejected by all of the state courts that passed upon the issue, the court below, and most of the other circuit courts [see *Angelet* v. *Fay*, 333 F. 2d 12 (2d Cir. 1964), *appeal pending* No. 578, Oct. Term, 1964; *Linkletter* v. *Walker*,

323 F. 2d 11 (5th Cir. 1963), *appeal pending* No. 95; Oct. Term, 1964; *Reynolds* v. *United States*, 324 F. 2d 371 (5th Cir. 1963); *Sisk* v. *Lane*, 331 F. 2d 235 (7th Cir. 1964); *Gaitan* v. *United States*, 317 F. 2d 494 (10th Cir. 1963); *McLester* v. *United States*, 306 F. 2d 880 (10th Cir. 1962); *Petition of Dirring*, 183 N. E. 2d 300 (Mass. 1962); *State* v. *Beltowski*, 123 N. W. 2d 207 (Minn. 1963), *cert. denied* 375 U. S. 947 (1963); *People* v. *Muller*, 182 N. E. 2d 99 (N. Y. 1962), *cert. denied* 371 U. S. 850 (1962); *Taylor* v. *People*, 392 P. 2d 294 (Colo. 1964); *Commonwealth ex rel. Wilson* v. *Rundle*, 194 A. 2d 143 (Pa. 1963); *Commonwealth ex rel. Altizer* v. *Hendricks*, 190 A. 2d 348 (Pa. Super. 1963); *Saulsbury* v. *Green*, 195 N. E. 2d 787 (Ohio 1964); *Villasino* v. *Maxwell*, 190 N. E. 2d 265 (Ohio 1963); *Spence* v. *Sacks*, 183 N. E. 2d 363 (Ohio 1962); *Moore* v. *State*, 146 So. 2d 734 (Ala. 1962), *cert. denied* 374 U. S. 811 (1963); *State* v. *Smith*, 202 A. 2d 669 (N. J. 1964); see *In re Harris*, 366 P. 2d 305, 309 (Cal. 1961) (TRAYNOR, J., concurring), *vac. other grounds* 374 U. S. 499 (1963); *People* v. *Martinez*, 302 P. 2d 643 (Cal. App. 1956); *State* v. *Hillman*, 125 A. 2d 94 (R. I. 1956); *contra*: *Hall* v. *Warden*, 313 F. 2d 483 (4th Cir. 1963), *cert. denied* 374 U. S. 809 (1963); *Walker* v. *Peppersack*, 316 F. 2d 119 (4th Cir. 1963); *California* v. *Hurst*, 325 F. 2d 891 (9th Cir. 1963), *appeal pending* No. 45, Oct. Term, 1964]. As is noted in the decision below and respondents' brief (pp. 2, 4), the thoughtful analysis of most commentators also rejects retroactivity of *Mapp*. This overwhelming judicial and scholarly experience shows that while the *Mapp* rule is now deemed basic to present cases, continuing undisturbed the validity of pre-*Mapp* judgments, and the imprisonment of pre-*Mapp* defendants, is not considered "custody in violation of the Constitution"

[see 28 U. S. C. §2241] or "in violation of fundamental law" [see *Fay* v. *Noia*, 372 U. S. 391, 83 S. Ct. 822, 829, 832, 834, 842, 846, 849 (1963)]. Petitioner's use of the word "fundamental" to combine the two entirely separate concepts (brief, pp. 16, 24, 26, 27) obscures the distinction, and should not be enshrined in the decisions of this Court.

2. *The exclusionary rule is distinguishable from other newly announced constitutional rights that were applied retroactively.*

By stressing the vital distinction between the emergence of a fundamental right, and a "right" to have it applied to earlier cases, we do not imply that no constitutional changes should be retroactive. Where appropriate, decisions of this Court have been applied to previously closed cases. But the Court has never held that, as petitioner now argues, in criminal cases all rulings based on the Constitution are, by that same authority, always retrospective, notwithstanding the consequences, and regardless of the policy of the right that is involved. Examination of the situations in which recent constitutional developments have been extended retroactively shows crucial differences from the instant case.

Griffin v. *Illinois* [351 U. S. 12 (1956)], involving the right of an indigent prospective appellant to a transcript, has been applied to prior convictions [see, *e.g.*, *Eskridge* v. *Washington State Board of Parole*, 357 U. S. 214 (1958)]. After *Gideon* v. *Wainwright* [372 U. S. 335 (1963)], this Court reversed a previously closed judgment that was entered without counsel [see *Doughty* v. *Maxwell*, 376 U. S. 202 (1964); see also *United States ex rel. Durocher* v. *La*

Vallee, 330 F. 2d 303 (2d Cir. 1964)]. The voiding on post-conviction collateral attack of the "New York procedure" for determining voluntariness [see *Jackson* v. *Denno*, 378 U. S. 368 (1964)] has been interpreted as implying retroactivity [see *People* v. *Huntley*, 15 N. Y. 2d ——, N. Y. L. Jour. Feb. 5, 1965, p. 4, col. 1 (Jan. 7, 1965); *Butler* v. *Rundle*, —— A. 2d ——, 33 U. S. L. W. 2361 (Pa. 1965)]. In those cases, however, the fundamental unfairness of denying to prior defendants the benefits of newly announced rights is clearer than in the instant situation. The wrongs that were perceived in the former three decisions are, and always were, at the heart of the judgment itself, for they precluded a fair trial of vital issues that were always in the case. As to *Griffin*, the appeal that was denied was "an integral part of the [state] trial system for finally adjudicating the guilt or innocence of a defendant" [351 U. S. at 18]. According to the rationale of *Gideon*, the community has no cause for confidence in the validity of a judgment rendered against a defendant without counsel, whatever the date of conviction. Claims available to a defendant with counsel, including innocence, procedural errors, and violations of previously declared constitutional rights, were effectively denied by the inherently prejudicial absence of an attorney. Similarly, according to the reasoning of *Jackson*, the defendants in prior New York cases never had a fair hearing on their contentions that their confessions were involuntary. Accepting the description of the psychology of jurors that this Court set forth in *Jackson*, this psychological situation obtained before *Jackson*, and the issue of coercion was incapable of fair determination in all pre-*Jackson* cases that used the "New York procedure."

On the other hand, as the decision below pointed out, the essential issue in *Mapp* was not whether the defendant had a fair trial leading to a reliable judgment of conviction, but the necessity of fashioning an effective "deterrent safeguard"; "the purpose of the exclusionary rule 'is to deter' " invasions of privacy from occurring before trial, or even when there is no trial [367 U. S. at 648, 656]. The rights violated in the other three cases can be restored by allowing an appeal, vacating the judgment and supplying counsel, or granting a hearing as to coercion. But the past illegal police practices that would now be alleged on the basis of *Mapp*, even if they could be considered "confirmed" by uncertain attempts to reconstruct forgotten events in these and countless other cases, cannot be corrected. In the minority of cases in which such violations would be established, vacating the judgments would only be a gratuitous form of "compensation," a type of collateral relief hitherto unknown to the Constitution, and inconsistent with this Court's statement in *Mapp* that compensatory remedies are "futile" for protection of Fourth Amendment rights [367 U. S. at 651-652].

Further, it cannot "lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement" [see *Mapp* v. *Ohio*, *supra*, 367 U. S. at 659-660], and that if those defendants' cases had arisen today, the evidence would be unavailable to the police, and inadmissible in court. The opinion in *Mapp* referred to the long history of effective federal justice under the *Weeks* rule, and the adoption of the rule in many states, including California [see *People* v. *Cahan*, 282 P. 2d 905 (Cal. 1955)]. Seven years' experience under the *Cahan* decision in California led its author to conclude that exclusion did not

frustrate law enforcement or obstruct the availability of evidence [see Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 DUKE L. JOUR. 319, 322, 323 (1962)]. This view was reiterated by the Attorney General of California [see letter quoted in Kamisar, *Wolf & Lustig Ten Years Later*, 43 MINN. L. REV. 1083, 1158 (1959)]. An exhaustive study of statistics of arrests and convictions in California under the *Cahan* rule shows no hampering of law enforcement [Kamisar, *Public Safety* v. *Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L., CRIMINAL & POL. SCI. 171, 188-190 (1962)]. Thus, if on the issue of "fairness" prosecutions of pre-*Mapp* prisoners are to be treated as though they had occurred today under the *Mapp* rule, it appears likely that in the great bulk of such cases the evidence would be admissible, and the convictions secure. While the police—as distinguished from the trial court and prosecutor—may have been on notice before *Mapp* that their conduct was unlawful, unlawfulness was not a necessary condition of securing and admitting the evidence. In the instant case, for example, a warrant to search the premises easily could have been obtained. On the other hand, denying a transcript or an attorney to indigent defendants, permitting the jury alone to determine voluntariness, or obtaining a confession that was the product of coercion, could not have taken place without violating the Constitution.

In sum, consistently with constitutional doctrines concerning the nature of individual rights and the role of this Court, the Court may choose not to apply *Mapp* retroactively. In deciding the question, the Court cannot ignore the effects of retroactivity on the judicial process, and the rights of other defendants.

B. Retroactivity Would Place Heavy Burdens on the Administration of Justice.

1. All states would be affected.

If *Mapp* were retroactive, past judgments in every state would be subject to re-examination. Judgments in the twenty-seven states that at the time of *Mapp* had either no exclusionary rule, or a rule inapplicable to the majority of cases [see *Elkins* v. *United States*, 364 U. S. 206, 224-234 (1960)], would of course be affected. Retroactivity would also involve cases in the twenty-three states that adopted comprehensive exclusionary rules before *Mapp* [*ibid.*]. Since all states are now required to apply the same constitutional search-and-seizure standards as the federal courts [*Ker* v. *California*, 374 U. S. 23 (1963)], convicts in the twenty-three pre-*Mapp* "exclusionary" states would be free to allege variations between those states' previous interpretations of the right to privacy, and this Court's current views [see *Sisk* v. *Lane, supra; California* v. *Hurst, supra; Bates* v. *Dickson*, 226 F. Supp. 983 (N. D. Cal. 1964); *People ex rel. Winkle* v. *Bannan*, 125 N. W. 2d 875 (Mich. 1964), *cert. denied* 33 U. S. L. W. 3244 (1965); *Moore* v. *State*, 146 So. 2d 734 (Ala. 1962), *cert. denied* 374 U. S. 811 (1963)]. Even *Wolf* v. *Colorado* held only the "core" of the Fourth Amendment applicable to the states; now, under *Ker*, all the broad federal constitutional principles apply.

2. The number of previously closed state cases to be relitigated would be enormous.

Although it is clear that all states would be affected by retroactivity, the number of previous state cases that would have to be reviewed cannot be estimated. Accuracy requires, preliminarily, knowledge of the number of state prisoners confined at the time of the *Mapp* decision who are still "in custody" [see 28 U. S. C. §2241], and the number of defendants who have been re-imprisoned as multiple offenders since *Mapp* on the basis of at least one pre-*Mapp* conviction. The population of state prisons shortly before the *Mapp* decision, at the end of 1960, was 189,907 [U. S. CENSUS BUREAU, 1963 STATISTICAL ABSTRACT OF THE U.S. 163]; the average sentence of prisoners released from state institutions in 1960 was six years and seven months, and the average time served two years and four months [FEDERAL BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, PRISONERS RELEASED FROM STATE AND FEDERAL INSTITUTIONS (1960)]. Therefore, perhaps a third to a half of pre-*Mapp* state prisoners are still in custody, in prison or on parole.

In addition to the number of pre-*Mapp* prisoners still in custody, the percentage of these defendants whose cases might have involved search-and-seizure questions must be calculated. In what seems to be a very conservative estimate, a judge of a busy New York trial court has concluded from a study of records of pre-*Mapp* cases in his court that an issue of unlawful or unreasonable search "might have been raised" in about 10% [SOBEL, A COMMENT ON THE LAW OF SEARCH AND SEIZURE (1962), quoted in *Angelet* v. *Fay*, No. 578, Oct. Term, 1964, petitioner's brief, pp. 14-

15]. This classification apparently refers to cases in which the defendant may have a claim worthy of careful examination; the percentage of cases in which evidence was produced by a search or seizure must be much greater.

Further, the proportion of search-and-seizure cases may be higher among defendants who are still in custody since 1961 than for pre-*Mapp* prisoners who have been released. The above-cited reports show, for example, that the sentences imposed and time served for narcotics felonies are much higher than the average; in many of these "contraband" cases, the defendants would allege search-and-seizure questions. Also, defendants who declined to acknowledge their guilt, but put the state to the expense of proving it at trial, generally received longer sentences than defendants who pleaded guilty to the same charges; challenges to the use of unlawful evidence would presumably be limited to the former group if *Mapp* were held retroactive, since the latter judgments were based on pleas, not evidence. Thus, while no precise determination can be made of the number of prisoners, presently in custody on the basis of judgments that were considered closed before *Mapp*, who would raise Fourth Amendment claims, there are potentially thousands. The number would be multiplied if past defendants who are no longer in custody were entitled to reopen their cases.

3. *The implementation of retroactivity procedurally in these cases would be overburdening.*

Judging the effect of the retroactivity of *Mapp* implies not only consideration of the number of past defendants who would raise search-and-seizure claims, but also analy-

sis of the manner in which the claims would have to be examined and tested. With "federal courts already laboring under congested dockets,"[1] the states would doubtless be given the first "opportunity" of reviewing the mountains of claims of pre-*Mapp* defendants [see *Henry* v. *Mississippi*, —— U. S. ——, n. 8, 33 U. S. L. W. 4146 (Jan. 18, 1965); *Jackson* v. *Denno*, 378 U. S. 368 (1964)]. Some defendants' claims might be dismissed upon cursory examination of the court records—for example, if the states were allowed to rule that judgments entered on pleas of guilty should remain closed. Others might be disposed of upon the face of the defendants' applications alone. It may be presumed, for instance, that state courts would be permitted to follow the practice of the federal District Courts, and require clear factual, rather than conclusory, allegations setting forth a violation of constitutional rights before granting a post-conviction hearing on the defend-

1. The following chart shows the increase in post-conviction collateral applications filed in federal District Courts [ADMINISTRATIVE OFFICE OF U. S. COURTS, 1963 REPORT OF THE DIRECTOR 144; 1962 REPORT 130; 1959 REPORT 109; *Henry* v. *Mississippi*, —— U. S. ——, n. 8, 33 U. S. L. W. 4146 (Jan. 18, 1965)]:

fiscal year	*state prisoner habeas corpus*	*federal prisoner habeas corpus*	*28 U.S.C. §2255 motions*
1952	541	406	90
1953	548	346	119
1954	597	395	263
1955	660	362	279
1956	734	429	235
1957	778	339	231
1958	755	408	321
1959	822	553	494
1960	872	767	538
1961	906	860	560
1962	1,232	866	546
1963	2,106	862	595
1964	3,501	—	—

ants' claims. In addition, it would be hoped that the states, like the federal District Courts, would not be required by this Court to entertain collateral attacks from persons who are no longer "in custody" [*cf.* 28 U. S. C. §2241]. If state, or federal, courts were required to extend collateral attacks based on *Mapp* to defendants who have served their sentences, or who received suspended sentences, the chaos would be intensified.

Even if the cases described above could be spared the severest rigors of retroactivity, they would still require hours of work by judges and states' attorneys, and perhaps assigned defense counsel, at the lower court and appellate level.

The remaining cases, which would require more careful examination, probably would comprise the bulk of the retroactivity docket. Judging from collateral applications in other areas than search and seizure, prima facie claims of unconstitutionality are easy to compose, even if factual allegations are required. In the instant situation, however, the available records would rarely provide an answer to the claim. In many cases, no appeal was taken, no trial record will be in the files, and stenographic staffs will have to prepare transcripts. In others, the trial minutes will be available, but inconclusive or silent on the issues raised by the application, including not only the alleged unlawfulness, but also the question whether there was a "search" or "seizure" within the meaning of the Constitution. In both instances, examination of trial records in the light of the defendant's motion papers would be required. Applied to this examination would be imprecise, often cloudy

concepts of the law of search and seizure, including "the troublesome line * * * between mere suspicion and probable cause" [see *Brinegar* v. *United States*, 338 U. S. 160 (1949)], "consent," the permissible scope of a search pursuant to an arrest, and the moment when evidence obtained after an unconstitutional search is "purged of the primary taint" [see *Wong Sun* v. *United States*, 371 U. S. 471 (1963)]. At the present stage of Fourth Amendment jurisprudence, this examination would proceed without guidance from this Court whether the states are free to apply varying versions of the "harmless error" doctrine to these collateral attacks. Even assuming, however, that state courts would be able to adopt the reasonable course of denying post-*Mapp* claims of pre-*Mapp* prisoners if the trial record contains clear proof of guilt without the allegedly tainted evidence [see *Reeves* v. *Warden*, 226 F. Supp. 953, 960-961 (D. Md. 1964); *State* v. *Smith*, 202 A. 2d 669, 675 (N. J. 1964); *State* v. *Beltowski*, 123 N. W. 2d 207 (Minn. 1963), *cert. denied* 325 U. S. 947 (1963)], a great proportion of applications would still require further attention, particularly in "contraband" cases.

State courts might also be permitted to apply procedural rules requiring adequate objection at trial. Even with such sound requirements, however, trial minutes would have to be reviewed to determine the adequacy of the challenge, and the litigation would continue in the appellate courts. In addition, the number of cases in which sufficient objection was found would be large; it may be noted that in direct appeals from pre-*Mapp* trials, state courts have been liberal in discerning the required challenges in the record, and that in many of those cases, in-

cluding *Mapp*, unequivocal objection was entered at trial (see pp. 5-6, *supra*).

Such applications, having passed through the tedious initial scrutiny, would require an evidentiary hearing as to the merits of the constitutional claim. Absent a concession by the state, it could not be assumed, in the instant case or any other, that the record would be conclusive as to the complex factual and constitutional questions raised.

In connection with the hearings, probably the states would be allowed to place the burden of proof of establishing unconstitutionality upon the defendant, as in federal habeas corpus. This would be small comfort to the administration of justice. Police officers and prosecutors would still be required to investigate, and reconstruct as witnesses, events previously considered closed. Most hearings would consume days in court. Calendars would be clogged with the backlog of hearings on pre-*Mapp* searches, and the pending cases of new defendants whose trials would be delayed. The hearings frequently would produce unreliable results. In many cases, passage of time fades memories, renders witnesses and tangible evidence unavailable, and therefore precludes accurate assessment of Fourth Amendment claims, which usually turn on closely contested questions of fact, judged by vague standards of law. By the same token, the defendant would often have an unfair advantage over the state. While the defendant would always be present, vital police witnesses might not. In addition, the defendant might remember more about his case than the officers, who usually have had hundreds of similar cases thereafter.

Some of the claims eventually would prevail, but since these cannot be identified in advance, the foregoing effects on the state judicial systems of allowing all the claims would be the price of the minority that succeeded. The implications of retroactivity of *Mapp* cannot be judged solely by hypothesizing the claims that would be sustained, without considering the foregoing effects of requiring the systems to make the initial inquiry.

4. The federal courts would also be affected.

Retroactivity of *Mapp* would also add to the congestion of the already overburdened federal courts. (see note 1, *supra*). Unsatisfied state prisoners would petition for federal writs of habeas corpus, or certiorari.[2] The federal judiciary, and states' attorneys, would be caught up in relitigating claims already presented to the states.

In addition, a holding of retroactivity would subject past federal convictions to re-examination. Prior to *Mapp*, the federal courts excluded evidence that was obtained

2. The following chart shows the increase in petitions for certiorari filed in this Court [ADMINISTRATIVE OFFICE OF U. S. COURTS, 1963 REPORT OF DIRECTOR 180-181; *Henry* v. *Mississippi, supra*]:

October Term	*In Forma Pauperis*	*Appellate Docket*	*Total*
1953	528	603	1,131
1954	543	626	1,169
1955	583	787	1,370
1956	639	851	1,490
1957	680	716	1,396
1958	772	760	1,532
1959	836	767	1,603
1960	950	718	1,668
1961	1,138	778	1,916
1962	1,213	823	2,036
1963	1,532	—	—

unlawfully [see *Weeks* v. *United States*, 232 U. S. 283 (1914)]. That exclusion, however, was not a constitutional requirement, but a "rule of evidence," based on this Court's "supervisory power over the administration of justice in the federal courts," and for that reason state cases were uniformly distinguished [see *Wolf* v. *Colorado*, 338 U. S. 25 (1949); *Elkins* v. *United States*, 364 U. S. 206, 216 (1960)]. *Mapp* destroyed the distinction when, overruling *Wolf*, it based exclusion directly on the Constitution. Since the Fourth Amendment forbids admission of unlawfully seized evidence in state courts, the same constitutional rationale now applies to federal trials [see *Wong Sun* v. *United States*, 371 U. S. 471 (1963)], and if the exclusionary rule applies retroactively to state judgments because it is "fundamental," it affects previous federal judgments as well.

The federal post-conviction collateral proceedings—habeas corpus and motions to vacate judgments [28 U. S. C. §§2241, 2255]—are generally unavailable to test most claims that could have been raised on direct appeal [*Hill* v. *United States*, 368 U. S. 424 (1962)], and might therefore be inapplicable to a large number of prior federal prosecutions involving search and seizure questions [but *cf.* *United States* v. *Sutton*, 321 F. 2d 221 (4th Cir. 1963)]. Under petitioner's view, however, subsequent decisions that changed the federal constitutional standards could be invoked retroactively by federal defendants, because these new "fundamental" rights were unavailable at the time of trial and appeal.

For example, federal prisoners who were convicted previously in federal courts on the basis of evidence obtained

by state officers through searches, or wiretapping, have sought to reopen their cases because of this Court's subsequent overruling of the "silver platter" doctrine [*Elkins* v. *United States, supra,* overruling *Lustig v. United States,* 338 U. S. 74, 79 (1949)], a result which, in *Mapp,* rose to constitutional status. The circuit courts have rejected such claims, on the ground that *Mapp* is not retroactive [*Gaitan* v. *United States,* 317 F. 2d 494 (10th Cir. 1963); *McLester* v. *United States,* 306 F. 2d 880 (10th Cir. 1962); *Reynolds* v. *United States,* 324 F. 2d 371 (5th Cir. 1963); see also *United States* v. *Zavada,* 291 F. 2d 189 (6th Cir. 1961) (pre-*Mapp* decision that *Elkins* is not retroactive); *Alexander* v. *United States,* 290 F. 2d 252 (5th Cir. 1961) (*semble*)]. Petitioner's argument entails reversal of these decisions, and exposure of countless other past federal judgments to the changing currents of Fourth Amendment jurisprudence.

C. These Burdensome Effects of Retroactivity Would Impair the Administration of Justice, to the Detriment of Defendants with More Urgent Interests.

1. Retroactivity of Mapp would severely impair the ability of the judicial system to assimilate pressing recent changes in criminal law.

Requiring the state and federal courts to entertain and review Fourth Amendment claims of all pre-*Mapp* defendants, for the sake of the relatively few defendants who would eventually prevail, would impair the effectiveness of the judicial system. The immense eruption of complex litigation described above would hinder the important adjustment of the judicial system to broad current changes in many areas of criminal law. Because of these essential

changes in less than a generation, the system of justice that is embodied in the Constitution, as presently interpreted, is younger than most defendants whom the new rules benefit. These transformations have placed sufficiently heavy responsibilities on state—and federal—systems of criminal justice.

The local trial court, appellate court, prosecutor, attorney general, police department, and bar—the latter often prevailed upon by the trial and appellate judiciary to serve with little or no compensation—are already engaged in the complex, costly and time-consuming task of reexamining thousands of past judgments, altering present practice, and planning future procedures, in the light of the new developments. *Gideon* v. *Wainwright* [372 U. S. 335 (1963)], for instance, has voided innumerable convictions, and led to many new trials, for defendants who were not represented by counsel in the past. Provisions for public defenders, assignment of counsel, and other assistance for indigent defendants are being enacted for the future. *Griffin* v. *Illinois* [351 U. S. 12 (1956)] and succeeding cases have required local appellate courts, states' attorneys, public defenders, and assigned private counsel to process appeals from countless previous judgments. Present appellate procedures have been liberalized. *Fay* v. *Noia* [372 U. S. 391 (1963)] added immeasurably to the obligations of the administration of justice, state and federal, by permitting prisoners to raise, under certain conditions, claims that could have been presented earlier, before their cases were closed. Much of the recent torrent of federal habeas corpus petitions by state prisoners (see n. 1, *supra*) must be attributable to *Noia*. These petitions,

although generally without merit, often require burdensome review of court records, and preparation of answering papers. Those with prima facie merit may entail investigations and hearings.

Another broad decision, *Jackson* v. *Denno* [378 U. S. 368 (1964)], will require fifteen states, nine of which had no exclusionary rule before *Mapp*, and several federal circuits to enact new trial procedures for testing voluntariness of confessions. The process has also begun to extend back to previously closed cases. In New York, for example, numerous old cases are going to be re-examined because of the *Jackson* decision, as interpreted by the New York Court of Appeals [see *People* v. *Huntley*, 15 N. Y. 2d ——, N. Y. L. Jour., Feb. 5, 1965, p. 4, col. 1 (Jan. 7, 1965; see also *Butler* v. *Rundle*, —— A. 2d ——, 33 U. S. L. W. 2361 (Pa. 1965)]. Trial and appellate courts, defense lawyers, who will often have to be assigned without compensation, and prosecutors will devote considerable time examining lengthy trial records, and conducting new hearings. Officers in understaffed police forces may be required to testify. Unavoidably, trials of subsequently arrested defendants may be postponed. Also, future trials involving confessions or admissions will be longer and more burdensome to the community. Because the New York Constitution has been interpreted to require a jury trial as to voluntariness, the decision in *Jackson* meant adoption of the cumbersome two-stage "Massachusetts rule" [*People* v. *Huntley, supra*].

These important applications of newly evolved fundamental rights to past, present and future cases would be handicapped by deployment of limited, overtaxed resources

of the bench, bar, police and states' attorneys to the far less pressing matters of disinterring and vainly attempting to reconstruct in the light of *Mapp* countless cases of undeniably guilty defendants, who were represented by counsel, whose confessions, if any, were uncoerced, and whose convictions were entered before the present right of exclusion had evolved. In cases brought by individual defendants, the interpretation of the Constitution in a federal system often requires examination of the judicial system as a whole, judgments as to the priority of public resources, and comparisons among classes of defendants. Unless demonstrably necessary, a situation absent here, assimilation of the fruits of the judicial evolution of recent years should not be restricted by a requirement of digging into past trials to find occurrences now deemed unconstitutional, particularly if, as petitioner suggests, the number of state prisoners able to show that unlawfully seized evidence was used at trial will be "infinitesimally small" (petitioner's brief, p. 26, n. 23).

The foregoing discussion as to the burdens that retroactivity would impose upon the administration of justice clarifies further differences between the instant case, and the retroactivity of the rights to appeal and have trial counsel regardless of indigency, and to test a claim of coercion without a jury. In the latter situations, the disruption of the judicial system entailed by entertaining the claims of previously convicted defendants, while substantial, as was shown above, is significantly less than here. For instance, in those cases the initial inquiry into the primary allegations of unconstitutionality—deprivation of an appeal, absence of counsel, or use of the jury to determine voluntari-

ness—usually can be tested promptly by looking at a few documents. But initial inquiry into the claim that evidence used at trial was produced by an unlawful search would be cumbersome and time-consuming; not only must the trial record be reviewed, but in most cases a hearing would be required thereafter. In addition, the relative ease of verification in the former cases discourages frivolous or dubious applications and means that almost every claim will have merit, a situation absent here. And in cases arising under *Griffin* and *Jackson*, if the court determines, after the simple initial inquiry, that the fundamental procedural right was violated, the second inquiry—to determine whether there was error at trial, or coercion—is generally easier, and more dependable, than the judgment whether, years ago, there was a "search", and if so, whether it was unconstitutional. Trial error appears on the face of the record. Most of the facts as to the claim of coercion will also appear on the trial record, which can usually be reviewed by the original judge [see *People* v. *Huntley, supra*]; additional evidence, if any, would generally come from the defendant, who is always available. The ultimate factual inquiry under *Mapp*, however, as was shown above, would be much more difficult, and generally less reliable. The "limited," two-stage type of retroactivity of *Jackson* v. *Denno* would be unworkable and overburdening in the instant situation.

2. *Retroactivity of Mapp would impair the free development of constitutional law in the future.*

Retroactivity would unsettle not only past judgments in all states and the federal courts, but also future state and federal cases involving search-and-seizure questions.

If this Court agrees with petitioner that all decisions of the Supreme Court interpreting the Constitution should be held retroactive in scope, then future interpretations of the content of the Fourth Amendment, like the exclusionary rule itself, will be applicable to previous cases. In the field of search and seizure, the prospect of forthcoming "fundamental" interpretations is unlimited. "Because there can be no fixed formula, we are admittedly met with 'recurring questions of the reasonableness of searches'. * * * [L]ess is not to be expected when dealing with a Constitution" [see *Mapp* v. *Ohio*, 367 U. S. 643, 653 (1949)].

Among the many challenging "recurring questions" to be reviewed by state and federal courts are the elusive meaning of "probable cause," a concept already transformed from "circumstances which warrant suspicion" [see *Locke* v. *United States*, 11 U. S. (7 Cranch) 339, 348 (1813)] to "reasonable ground for belief of guilt" [see *Brinegar* v. *United States*, 338 U. S. 160, 175, n. 14 (1949)], and one whose application in particular cases often turns on the decision of a divided Supreme Court; the continuing development of standards of probable cause applicable to automobiles, and other modern forms of transportation that were unknown to the founding fathers [see *Carroll* v. *United States*, 267 U. S. 132 (1925); *United States* v. *Bonanno*, 180 F. Supp. 71 (S. D. N. Y. 1960)]; determinations whether flight may be considered an element of probable cause, recently the subject of a 4-4 vote in this Court [see *Wong Sun* v. *United States*, 371 U. S. 471 (1963); *compare Husty* v. *United States*, 282 U. S. 694, 700-701 (1931); *Brinegar* v. *United States*, 338 U. S. 160, 166, n. 7 (1949)]; the sufficiency of a single informant's communications to establish probable cause [see *Wong Sun* v. *United*

States, supra]; the right of police to stop for brief questioning or "frisk" suspicious persons travelling abroad [see N. Y. CODE CRIM. PROC. §180-a; N .H. REV. STAT. ch. 594; DEL. CODE §§1901-1932; R. I. GEN. L. t. 12, ch. 7; *People* v. *Rivera*, 14 N. Y. 2d 441 (1964), *cert. denied* —— U. S. —— (1965); *People* v. *Jackson*, 331 P. 2d 63 (Cal. 1958); *People* v. *Martin*, 293 P. 2d 52 (Cal. 1956)]; the admissibility in a state court of evidence obtained by wiretapping; the required proximity of a search to a lawful arrest; the shifting boundaries of the "curtilage" that is protected from official intrusion; the lawfulness of seizing "evidentiary" material [see *Gouled* v. *United States*, 255 U. S. 298, 309-311 (1921)]; the constitutionality of a police entry without announcement, on which this Court is closely divided [see *Ker* v. *California*, *supra*]; the extent to which voluntary oral statements are "fruits" of a search [see *Wong Sun* v. *United States*, *supra*]; whether the identity of an informer must be revealed to the defendant at a hearing on probable cause; whether the burden of proof at a hearing on the motion to suppress rests with the defense or the state [*compare United States* v. *Rivera*, 321 F. 2d 704 (2d Cir. 1963) *with Wilson* v. *United States*, 218 F. 2d 754 (10th Cir. 1955)]; and whether a "harmless error" doctrine may be applied to search and seizure questions on direct review of judgments, a question still undecided by this Court [see *Fahy* v. *Connecticut*, 375 U. S. 85 (1963)]. The simplicity of the "all-or-nothing" exclusionary rule creates the deceptive allure of retroactivity; it hinders the realization that retroactivity of that simple rule implies eternal retroactivity of all decisions concerning the unclear, complex content of the right that the rule enforces.

The inherent flexibility of the constitutional right that exclusion enforces, combined with the enormous scope of retroactivity—its potential application to numberless past and future judgments in every state and the federal jurisdiction—point to another major harm that retroactivity would inflict on the judicial system. "'[A]ll rules of law and human society are no more than working rules based on human experience, necessarily changing in form and substance as human experience varies in the evolutionary process of life.'"[3] This evolution should proceed unfettered by an arbitrary requirement that, regardless of the circumstances, old cases, properly settled under principles appropriate to that earlier stage in the creative judicial evolution, must continuously be exhumed and re-examined under new principles that are based on a different experience. The crux of most Fourth Amendment issues is current views of reasonableness and fairness, measured by contemporary, not past, experience. Since retroactivity of the exclusionary rule would entail permanent retroactivity of the changing contents of the Fourth Amendment, it would inhibit continuing formulations of the right that are suitable for present cases.

As the discussion earlier showed (pp. 7-8, *supra*), development of the exclusionary rule itself would have been hindered by a presumption of retroactivity. The evolution of the exclusionary rule has ended, but refinement of the Fourth Amendment continues. For example, as was noted above, state and federal courts are presently confronted

3. Letter from Arthur Linton Corbin, quoted in *Bibliography of the Published Works of Arthur Linton Corbin*, 74 YALE L. JOUR. 310, 311 (1964); see CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 167 (1921); CARDOZO, THE GROWTH OF THE LAW 53-54 (1925).

with claims that at hearings on motions to suppress evidence, defendants are entitled to know the identity of informers. The standards evolving from these cases depend on each court's delicate balancing of the effect of disclosure on current requirements of effective law enforcement, and the importance of disclosure to the defendant in the context of present-day trial procedures. A few state and federal courts, weighing these practical considerations, have held that the Fourth Amendment requires disclosure under certain conditions [see *United States ex rel. Coffey* v. *Fay*, 234 F. Supp. 543 (S. D. N. Y. 1964), *appeal pending; People* v. *Malinski*, 15 N. Y. 2d ——, N. Y. L. JOUR. Feb. 5, 1965, p. 4, col. 2 (Dec. 19, 1964); *Priestly* v. *Superior Court*, 330 P. 2d 39 (Cal. 1958); *Drouin* v. *State*, 160 A. 2d 85 (Md. 1960); *compare People* v. *Coffey*, 12 N. Y. 2d 443 (1963), *cert. denied* 376 U. S. 916 (1964)]. In the jurisdictions involved in each of the cited cases, however, the prevailing exclusionary rule, state or federal, has been held not retroactive. The spectre of retroactivity would have had an inhibitory effect on the development of rules relating to disclosure.

Similarly, the continuing examination in state and federal courts of the question whether a "harmless error" rule is consistent with contemporary conceptions of the Fourth Amendment would be handicapped by an extraneous matter, the prospect that rejection of such a rule would suddenly require reopening and reversal of the countless federal and state judgments that were affirmed under the rule, both on collateral attack [see *Reeves* v. *Warden*, 226 F. Supp. 953, 960-961 (D. Md. 1964); *State* v. *Smith*, 202 A. 2d 669, 675 (N. J. 1964); *State* v. *Beltowski*, 123 N. W. 2d 207 (Minn. 1963), *cert. denied* 325 U. S.

947 (1963)], and direct appeal [see FED. R. CRIM. PROC. 52(a); *United States* v. *McCall*, 291 F. 2d 859 (2d Cir. 1961); *Woods* v. *United States*, 240 F. 2d 37, 40 (D. C. Cir. 1956); *Gibson* v. *United States*, 149 F. 2d 381, 384 (D. C. Cir. 1945), *cert. denied* 326 U. S. 724 (1945); *People* v. *Parham*, 384 P. 2d 1001, 1004-1006 (Cal. 1963); *State* v. *Fahy*, 183 A. 2d 256 (Conn. 1962), *reversed on other ground* *Fahy* v. *Connecticut*, 375 U. S. 85; *State* v. *Doyle*, 186 A. 2d 499, 507-508 (N. J. Super. 1962); *State* v. *Stevens*, 251 P. 2d 163 (Wash. 1953); *Gross* v. *State*, 201 A. 2d 808, 816 (Md. 1964); *State* v. *Pokini*, 367 P. 2d 499 (Haw. 1961)].

The circumstances requiring, or excusing, an announcement prior to police entry upon a premises to make an arrest or execute a warrant also are being continuously defined, based on contemporary local experience [see *Ker* v. *California*, 374 U. S. 23 (1963); N. Y. CODE CRIM. PROC. §799]. These developments will no doubt form the basis for future conceptions of the Fourth Amendment, and should be free from the shadow of past cases.

Retroactivity in the instant case might also impair the evolution of sound constitutional principles in other fields than the Fourth Amendment. If *Mapp*, with its tenuous claim to retroactivity, is applied to old cases, distinguishing other constitutional decisions would be difficult. State courts, whose contributions to the content of federal due process have been substantial, might be especially haunted by the ghost of old cases. The extension of the right to counsel to noncoercive post-indictment interrogation [see *Massiah* v. *United States*, 377 U. S. 201 (1964)] was founded substantially on new departures by the New York Court of Appeals [*id.* at 204-205; see *People* v. *Waterman*,

9 N. Y. 2d 561 (1961); *People* v. *Meyer*, 11 N. Y. 2d 162 (1962); *People* v. *Di Biasi*, 7 N. Y. 2d 544 (1960)], but the latter court limited its holdings to prospective operation [see *People* v. *Howard*, 187 N. E. 2d 113 (N. Y. 1962)]. In applying right to counsel doctrine to certain pre-arraignment situations [see *Escobedo* v. *Illinois*, 378 U. S. 478 (1964)], this Court expressed approval of principles developed in New York [see *People* v. *Donovan*, 13 N. Y. 2d 148 (1963)], and noted that many states had urged the holding in *Gideon* v. *Wainwright* [372 U. S. 335 (1963) (*amicus* brief of states' attorneys general)]. However, the New York Court of Appeals has not applied *Donovan* retroactively, and the states that called for the holding in *Gideon* urged prospective application. Similarly, the Supreme Court of California has extended *Escobedo* and *Massiah* to pre-arraignment interrogation at which the defendant makes no request for counsel [see *People* v. *Dorado*, 394 P. 2d 952 (Cal. 1964)], but has declined retroactivity of those decisions [see *In re Lopez*, —— P. 2d ——, 33 U. S. L. W. 2390 (Cal. 1965); see also *State* v. *Johnson*, —— A. 2d ——, 33 U. S. L. W. 2375 (N. J. 1965)].

All of these developments in criminal procedure proceed under a reasonable presumption that retroactivity does not necessarily follow if a principle emerges from the cocoon of judge-made rules of evidence into the garden of fundamental rights. "[I]t would be regrettable if a supposed necessity to conform the criteria on habeas corpus to evolving standards of judicial administration and review in criminal trials should in the future prove to be a dogma reflexively inhibiting the evolution of those standards themselves" [Freund, *New Vistas in Constitutional*

Law, 112 U. PA. L. REV. 631, 638 (1964)]. This analysis reveals another distinction between the exclusionary rule and the constitutional rights that have been applied to previously closed cases. Retroactivity of *Griffin*, *Gideon* and *Jackson* will leave no permanent scars on the judicial process, after the finite number of prior cases affected are cleared up. The Fourth Amendment, by contrast, is open-ended, and its continuing refinement would be restricted by eternal retroactivity of the exclusionary rule.

Dramatic evolutions are occurring in American criminal procedure. *Mapp* v. *Ohio*, *Ker* v. *California*, *Gideon* v. *Wainwright*, *Escobedo* v. *Illinois*, *Massiah* v. *United States*, *Fay* v. *Noia*, *Jackson* v. *Denno*, and *Griffin* v. *Illinois* are at the head of a long list of decisions of the last decade in federal and state courts that proclaim broad, often drastic, changes in the requirements of a system of justice. The instant case, and its companion, *Angelet* v. *Fay*, will mark a turning point in this development. In deciding whether *Mapp* v. *Ohio* affects cases tried and closed under the previous "fundamental" law that *Mapp* overruled, this Court will determine to a great extent whether the continuing administration of criminal law is to be fluid, pragmatic and forward-looking, or inflexible and unwieldy, hindered by the past that the movement rejects.

Conclusion

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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On behalf of the
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February, 1965

SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1964

No. 95

VICTOR LINKLETTER,

Petitioner,

against

VICTOR G. WALKER, Warden of Louisiana State Penitentiary, *et al.*,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

No. 578

GEORGE ANGELET,

Petitioner,

against

EDWARD M. FAY, Warden of Green Haven State Prison, Stormville, New York,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTARY MEMORANDUM

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In Support of Respondents
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SUPPLEMENTARY MEMORANDUM

Introduction

During oral argument of *Linkletter* v. *Walker*, No. 95, October Term, 1964, on March 11, 1965, counsel for the National District Attorneys' Association, *amicus curiae*, appearing in support of respondent, was granted leave to submit a supplementary memorandum. The memorandum was to include statistics indicating the number of present New York State prisoners who were convicted prior to the decision in *Mapp* v. *Ohio* [367 U. S. 643 (1961)]. That material is submitted below, in Section I.

In addition, Mr. Justice Harlan asked counsel for *amicus* to submit information as to the number of pre-*Mapp* cases in which New York State defendants were executed, after trials at which evidence was elicited that might have been affected by the *Mapp* decision. Such information is also included below, in Section II.

In seeking to present all of this information rapidly and thoroughly, *amicus* has worked in cooperation with the Office of the Attorney General of the State of New York, counsel for respondent in *Angelet* v. *Fay*, No. 578, October Term, 1964. Since the information applies to both *Linkletter* and *Angelet*, this supplementary memorandum is submitted to cover both cases.

I. Statistics indicating the number of present New York State prisoners who were convicted before the decision in *Mapp* v. *Ohio* *

On June 30, 1964, the most recent date for which such figures are available, 17,057 convicted prisoners were confined in New York State prisons. Of these defendants, 4,688 were convicted before January 1, 1961; this is the closest date to the *Mapp* decision for which statistics can reasonably be compiled. In addition to the defendants who are still in prison, approximately 8,500 are on parole from New York State prisons.** While no precise estimate can be made of the number of present parolees who were convicted before the *Mapp* decision, the percentage is substantial; the median sentence of the 5,285 prisoners who were received in New York prisons in 1961 was 4 years, 9 months.

The figures as to defendants confined in prison are set forth in Table I, *infra;* the Table shows the number of prisoners convicted of each category of crime. The Table does not include the 2,925 mentally ill prisoners who on June 30, 1964, were confined in state hospitals operated by the Department of Correction; no figures are available to show how many of these patients were convicted before 1961. Nor does the Table indicate the number of prisoners sentenced as multiple offenders, whose prior offense or offenses occurred before 1961. If *Mapp* were retroactive, presumably these prior convictions, having been used as a basis for increased punishment, would have to be re-examined [*cf. United States ex rel. LaNear* v. *LaVallee*, 306 F. 2d 417 (2d Cir. 1962)].

* The information in this section, unless otherwise noted, was supplied by the New York State Department of Correction, Division of Research, Albany, N. Y., at the request of the Attorney General of the State of New York.

** On January 1, 1964, 8,554 persons were under the supervision of state parole authorities [N. Y. S. Div. of Parole, 1963 Report, p. 15, reprinted as N. Y. S. Leg. Doc. (1964) No. 107, p. 15].

TABLE I

Number of Inmates in New York State Prisons on June 30, 1964

Reason for Commitment	*Total on June 30, 1964*	*Total Convicted before Jan. 1, 1961*
ALL OFFENSES—TOTAL	17,057	4,688
FELONIES—TOTAL	13,869	4,543
Murder, 1st degree	201	132
Murder, 2nd degree	542	422
Manslaughter	1,163	435
Manslaughter by negligence	15	1
Rape	404	185
Robbery	3,653	1,411
Assault	1,261	229
Burglary	1,773	567
Burglar's Tools	56	14
Grand Larceny (not auto)	1,509	256
Auto Larceny	544	159
Kidnaping	29	21
Dangerous Weapons	241	61
Narcotics	1,361	229
Forgery	416	147
Sex offenses, except Rape	346	188
Criminally Receiving Stolen Property	53	12
Abandonment	18	1
Arson	105	45
Frauds and Cheats	3	
Compulsory Prostitution and Abduction	17	7
Intoxicated Driving	15	
Gambling	2	
Malicious Mischief	20	4
Escaped Prisoner	14	5
Abortion	21	
Bail Jumping	5	1
Bigamy	5	1
Blackmail	1	1
Extortion	20	5
Perjury	6	
Injury to Railroad Property	1	1
Bribery	23	2
Aiding Escaped Prisoner	1	
Conspiracy	24	1
Accessory	1	
NON-FELONIES—TOTAL	3,188	145
Misdemeanors and Offenses	1,349	
Youthful Offender	1,642	
Wayward Minor	115	
Girls' Term Respondent	52	
Juvenile Delinquent	30	
TOTAL	17,057	4,688

II. Review, in the light of *Mapp* v. *Ohio*, of New York State capital cases that were disposed of before *Mapp*

From 1930 to the present date, 316 New York State prisoners have been executed.[1] Two of these executions occurred after the decision in *Mapp* v. *Ohio*, and concerned post-*Mapp* trials.[2] All of the convictions were rendered after trial. The material below is a review, in the light of *Mapp* v. *Ohio* and its progeny, of the trials of the last 100 New York defendants who were executed before the *Mapp* decision.

The 100 cases are listed below in Table II. The cases are numbered from 1 to 100, in chronological order of execution. The Table shows the defendant's name, the county of conviction, the date of conviction, and the date of execution. In addition, the Table indicates, by an "X" in the appropriate column, whether certain types of evidence that come within the scope of *Mapp* v. *Ohio*, or might possibly be affected by that decision, were elicited at trial: (*A*) tangible evidence recovered by police officers; (*B*) testimony by police officers as to their observations during a search;[3] (*C*) the defendant's incriminating statements to

1. The list of executions discussed herein was supplied by the Office of the Warden of New York State's Sing Sing Prison, at the request of the Attorney General. All sentences of death in New York are carried out at Sing Sing. Three federal prisoners were also executed there since 1930.

2. Frederick Wood, convicted Dec. 7, 1961, conviction affirmed 12 N. Y. 2d 69 (1962), executed Mar. 21, 1963; Eddie Lee Mays, convicted Nov. 8, 1962, conviction affirmed 13 N. Y. 2d (1963), executed Aug. 15, 1963.

3. *Cf. Henry* v. *Mississippi*, —— U. S. ——, 33 U. S. L. W. 4146 (Jan. 18, 1965).

the police;[4] (*D*) identification of the defendant by witnesses at the police station after his arrest.[5] The Table is not designed to express a judgment whether the search, seizure or arrest was constitutional or invalid. If more than one of the defendants listed in the Table were tried together, their names are connected by brackets.

Following the Table are narrative summaries of each of the 100 cases, numbered as in the Table. The summaries were prepared from the printed records and briefs on appeal to the New York Court of Appeals. At the head of each summary is the defendant's name; the county of conviction, in parentheses; the date of conviction; the citation to the New York Court of Appeals decision affirming the conviction; and the date of execution. Each summary includes a short description of the crime, and of the evidence of guilt. If the record shows that the police (*A*) obtained tangible evidence that was used at trial, (*B*) observed incriminating evidence during a search, (*C*) received an incriminating statement from the defendant, or (*D*) obtained a witness's identification of the defendant at the police station, the relevant facts appearing on the record are summarized. The notations "(*A*)" through "(*D*)," corresponding to the information in Table II, appear at the appropriate place in the narrative. If the record includes facts that indicate the basis for the search or arrest, these facts are set forth in the summary.

In some cases, the record contains facts establishing probable cause for an arrest, and the lawfulness of the

4. *Cf. Wong Sun* v. *United States*, 371 U. S. 471 (1963); *Traub* v. *Connecticut*, 374 U. S. 493 (1963).

5. This evidence, future defendants might argue, is "fruit of the poisoned tree," if the arrest and detention were unconstitutional. *Cf. Wong Sun* v. *United States*, *supra*, n. 4.

ensuing search, assuming that the testimony favorable to the People on these matters is accepted.[6] In some cases, according to the record, no evidence was obtained as a direct result of an arrest or search.[7] In many instances, however, where an evidence-producing arrest or seizure obviously occurred, the record is silent or vague as to the basis for the police action.[8] In other cases, the facts on the record are too sparse even for a determination whether there was an "arrest" or "search" in the constitutional sense of those terms.[9] In many, the record raises a question as to the defendant's standing to challenge the evidence, but the available facts allow no answer.[10] Therefore, no attempt has been made to judge the validity of the police conduct, or the admissibility of the evidence under present standards.

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6. See, *e.g.*, Nos. 26, 27, Milton Shaket and John Reilly; No. 28, Harris Gray; No. 55, Edward H. Kelly; No. 58, Donald H. Snyder; No. 65, William Vanderwyde; No. 69, Romulo Rosario; No. 82, MacDonald Browne; No. 92, Leroy Keith.

7. See, *e.g.*, No. 6, Oliver Little; No. 30, Eugene Pannell; Nos. 37, 38, John Dunn and Andrew Sheridan. Conceivably, in one or more of these cases, the police obtained clues to evidence that was used at trial by a search or arrest affecting the defendant; this is unlikely, and does not appear on the record.

8. See, *e.g.*, No. 9, Louis Brookins; No. 21, Enix Bussey; No. 22, Jauvhan Jackson; No. 29, Louis Smiley; No. 45, Harley G. LaMarr; No. 52, John Saiu; No. 53, Bernard Stein; Nos. 62, 63, Henry Lewis Allen and John Martin; No. 97, Willard Phillips; No. 98, Ronald Chapman. The records of these cases do not state whether the police had a search warrant, and are generally inconclusive on the question of consent.

9. See, *e.g.*, No. 7, George Donaldson; Nos. 11, 12, Edward Kahkoska and Edward Koberski; No. 23, Anthony R. Papa; No. 46, Willie W. Bunch; No. 76, Norman Roye; No. 84, David Taylor.

10. See, *e.g.*, No. 5, George F. Knight; Nos. 10, 12, Henry P. Suckow and Edward Koberski; No. 19, William James Thomas; No. 40, Floyd Arrington; No. 54, Wallace Ford; No. 64, Emile Hendricka Scott; Nos. 70, 71, 72, Harry A. Stein, Nathan Wissner and Calman Cooper; No. 75, William Byers; No. 84, David Taylor; No. 88, Virgil Richardson; No. 90, Jackson Turner, Jr.

TABLE II

Last 100 New York State Defendants Executed Before *Mapp* v. *Ohio*

	Defendant	*County of Conviction*	*Date of Conviction*	*Date of Execution*	*Evidence at trial included:* (A) Tangible evidence obtained by police	(B) Observations by police during a search	(C) Defendant's statements to police	(D) Identification of defendant at police station
1.	Peter DeLutro	N. Y.	11/ 8/43	6/29/44	×		×	
2.	(Lew York Hing	N. Y.	12/21/43	8/31/44	×		×	
3.	(Yun Tieh Li	N. Y.	12/21/43	8/31/44			×	
4.	(Helen Fowler	Niagara	2/11/44	11/16/44	×	×	×	
5.	(George F. Knight	Niagara	2/11/44	11/16/44	×	×	×	
6.	Oliver Little	N. Y.	4/20/45	1/17/46				
7.	George Donaldson	Rensselaer	6/25/45	3/ 7/46	×		×	
8.	Abraham Gold	Kings	6/18/45	4/25/46	×		×	
9.	Louis Brookins	Monroe	10/ 9/45	9/12/46	×		×	
10.	(Henry P. Suckow	Queens	7/24/46	3/ 6/47	×		×	
11.	(Edward Kahkoska	Queens	7/24/46	3/ 6/47	×		×	
12.	(Edward Koberski	Queens	7/24/46	3/ 6/47	×		×	
13.	(Arthur Johnson	Kings	8/ 1/46	4/17/47				
14.	(William Washington	Kings	8/ 1/46	4/17/47			×	
15.	Ward Beecher Caraway	Nassau	12/18/46	7/ 3/47	×		×	
16.	Salvatore DiCristofaro	Erie	11/29/46	7/10/47	×	×	×	
17.	(Edward N. Jones	Kings	4/22/46	7/10/47			×	
18.	(Arnold Sims	Kings	4/22/46	7/10/47			×	
19.	William James Thomas	N. Y.	12/11/46	7/10/47	×		×	
20.	Webster Daniel	N. Y.	1/28/47	8/21/47	×			
21.	Enix Bussey	N. Y.	3/24/47	12/ 4/47	×		×	
22.	Jaurhan Jackson	Kings	4/ 7/47	1/ 8/48	×		×	

	(Helen Powell	Niagara	2/11/44	11/16/44	×	×	×	
5.	(George F. Knight	Niagara	2/11/44	11/16/44	×	×	×	
6.	Oliver Little	N. Y.	4/20/45	1/17/46				
7.	George Donaldson	Rensselaer	6/25/45	3/ 7/46	×		×	
8.	Abraham Gold	Kings	6/18/45	4/25/46	×		×	
9.	Louis Brookins	Monroe	10/ 9/45	9/12/46	×		×	
10.	(Henry P. Suckow	Queens	7/24/46	3/ 6/47	×		×	
11.	(Edward Kahkoska	Queens	7/24/46	3/ 6/47	×		×	
12.	(Edward Koberski	Queens	7/24/46	3/ 6/47	×		×	
13.	(Arthur Johnson	Kings	8/ 1/46	4/17/47				
14.	(William Washington	Kings	8/ 1/46	4/17/47			×	
15.	Ward Beecher Caraway	Nassau	12/18/46	7/ 3/47	×		×	
16.	Salvatore DiCristofaro	Erie	11/29/46	7/10/47	×	×	×	
17.	(Edward N. Jones	Kings	4/22/46	7/10/47			×	
18.	(Arnold Sims	Kings	4/22/46	7/10/47			×	
19.	William James Thomas	N. Y.	12/11/46	7/10/47	×		×	
20.	Webster Daniel	N. Y.	1/28/47	8/21/47	×			
21.	Enix Bussey	N. Y.	3/24/47	12/ 4/47	×		×	
22.	Jauvhan Jackson	Kings	4/ 7/47	1/ 8/48	×		×	
23.	Anthony R. Papa	Nassau	10/22/47	7/ 1/48	×		×	
24.	(Lester Haughton	Bronx	4/14/47	7/22/48	×		×	
25.	(George C. Moore	Bronx	4/14/47	7/22/48	×		×	
26.	(Milton Shaket	N. Y.	11/19/47	9/16/48	×			
27.	(John Reilly	N. Y.	11/19/47	9/16/48	×			
28.	Harris Gray	N. Y.	3/10/48	1/ 6/49	×		×	
29.	Louis Smiley	N. Y.	3/15/48	1/13/49		×	×	
30.	Eugene Pannell	N. Y.	4/23/48	1/20/49				
31.	(Willie Grant	N. Y.	6/26/47	1/20/49			×	×
32.	(George Louis Monge	N. Y.	6/26/47	1/20/49			×	×

TABLE II (Continued)

Last 100 New York State Defendants Executed Before *Mapp* v. *Ohio*

	Defendant	County of Conviction	Date of Conviction	Date of Execution	Evidence at trial included: (A) Tangible evidence obtained by police	(B) Observations by police during a search	(C) Defendant's statements to police	(D) Identification of defendant at police station
33.	(Santo Bretagna	N. Y.	7/ 7/48	3/ 3/49			×	
34.	(William Rosenberg	N. Y.	7/ 7/48	3/ 3/49			×	
35.	(Herman Dupree	N. Y.	12/ 9/48	6/30/49			×	
36.	(Harold Dupree	N. Y.	12/ 9/48	6/30/49			×	
37.	(John Dunn	N. Y.	1/19/48	7/ 7/49				
38.	(Andrew Sheridan	N. Y.	1/19/48	7/ 7/49				
39.	(William M. Jackson	N. Y.	12/21/48	9/ 1/49	×		×	
40.	(Floyd Arrington	N. Y.	12/21/48	9/ 1/49	×		×	
41.	Walter Davis	Kings	1/ 7/49	9/ 8/49	×		×	
42.	Frank Bruno	Kings	2/10/49	1/ 5/50			×	
43.	George Peter Reeh	N. Y.	6/ 6/49	1/12/50			×	
44.	Julio R. Perez	N. Y.	11/23/48	6/25/50	×		×	
45.	Harley G. LaMarr	Erie	4/17/60	1/11/51	×		×	
46.	Willie W. Bunch	Nassau	2/10/50	2/15/51	×	×	×	
47.	Gilberto C. Walker	N. Y.	6/27/50	3/ 1/51	×		×	×
48.	(John J. King	Queens	6/29/50	3/ 8/51	×		×	
49.	(Richard Power	Queens	6/29/50	3/ 8/51	×		×	
50.	(Raymond Fernandez	Bronx	8/22/49	3/ 8/51	×		×	
51.	(Martha Beck	Bronx	8/22/49	3/ 8/51	×		×	
52.	John Saiu	Bronx	6/30/50	4/12/51	×		×	
53.	Bernard Stein	N. Y.	11/ 6/50	2/ 6/52	×	×	×	×

Gen

39.	(William M. Jackson	N. Y.	12/21/48	9/ 1/49	×		×	
40.	(Floyd Arrington	N. Y.	12/21/48	9/ 1/49	×		×	
41.	Walter Davis	Kings	1/ 7/49	9/ 8/49	×		×	
42.	Frank Bruno	Kings	2/10/49	1/ 5/50			×	
43.	George Peter Reeh	N. Y.	6/ 6/49	1/12/50			×	
44.	Julio R. Perez	N. Y.	11/23/48	6/25/50	×		×	
45.	Harley G. LaMarr	Erie	4/17/60	1/11/51	×		×	
46.	Willie W. Bunch	Nassau	2/10/50	2/15/51	×	×	×	
47.	Gilberto C. Walker	N. Y.	6/27/50	3/ 1/51	×		×	×
48.	(John J. King	Queens	6/29/50	3/ 8/51	×		×	
49.	(Richard Power	Queens	6/29/50	3/ 8/51	×		×	
50.	(Raymond Fernandez	Bronx	8/22/49	3/ 8/51	×		×	
51.	(Martha Beck	Bronx	8/22/49	3/ 8/51	×		×	
52.	John Saiu	Bronx	6/30/50	4/12/51	×		×	
53.	Bernard Stein	N. Y.	11/ 6/50	2/ 6/52	×	×	×	×
54.	Wallace Ford	Genesee	12/ 4/51	10/30/52	×		×	
55.	Edward H. Kelly	Ulster	10/ 2/50	10/30/52	×			
56.	Joseph Paonessa	Dutchess	6/15/51	1/15/53	×		×	
57.	Frank Wojcik	Wyoming	5/13/52	4/16/53	×		×	
58.	Donald H. Snyder	Putnam	9/22/52	7/16/53	×		×	
59.	William Draper	Monroe	5/ 6/52	7/23/53	×	×	×	
60.	(Maurice O'Dell	Erie	5/ 1/53	1/ 7/54	×		×	
61.	(Walter Griffen	Erie	5/ 1/53	1/ 7/54	×			
62.	(Henry Lewis Allen	Kings	7/15/53	3/11/54	×		×	
63.	(John Martin	Kings	7/15/53	7/15/54	×		×	

TABLE II (Continued)

Last 100 New York State Defendants Executed Before *Mapp* v. *Ohio*

	Defendant	County of Conviction	Date of Conviction	Date of Execution	Evidence at trial included: (A) Tangible evidence obtained by police	(B) Observations by police during a search	(C) Defendant's statements to police	(D) Identification of defendant at police station
64.	Emile Hendricka Scott	N. Y.	10/19/53	7/15/54	×	×		×
65.	William Vanderwyde	N. Y.	4/30/52	7/22/54	×			
66.	(John Dale Green	Bronx	1/ 8/53	8/26/54	×		×	
67.	(Barry Jacobs	Bronx	1/ 8/53	8/26/54			×	
68.	Henry Mathews	N. Y.	4/ 8/54	2/10/55			×	
69.	Romulo Rosario	N. Y.	5/14/54	2/17/55	×		×	
70.	(Harry A. Stein	Westchester	12/27/50	7/ 9/55	×		×	×
71.	(Nathan Wissner	Westchester	12/27/50	7/ 9/55	×			×
72.	(Calman Cooper	Westchester	12/27/50	9/ 8/55	×		×	×
73.	(Clarence Reed	N. Y.	12/ 2/54	9/ 8/55	×		×	×
74.	(Edward Nichols	N. Y.	12/ 2/54	9/ 8/55	×		×	×
75.	William Byers	N. Y.	2/10/55	1/12/56	×	×	×	
76.	Norman Roye	N. Y.	3/ 4/55	1/19/56	×		×	
77.	John Francis Roche	N. Y.	11/30/54	1/26/56	×		×	
78.	Ernest Edwards	Kings	4/ 4/55	6/28/56	×		×	
79.	Frank J. Newman	Nassau	12/12/55	8/23/56	×	×	×	
80.	Joseph Reade	Chautauqua	12/ 2/55	8/30/56	×		×	
81.	Leonard Salemi	N. Y.	6/24/53	2/28/57				
82.	MacDonald Browne	Bronx	3/ 8/56	3/14/57	×		×	
83.	Miguel Santiago	N. Y.	12/17/56	8/15/57	×		×	

68.	Henry Mathews	N. Y.	4/ 8/54	2/10/55			×	
69.	Romulo Rosario	N. Y.	5/14/54	2/17/55	×		×	
70.	(Harry A. Stein	Westchester	12/27/50	7/ 9/55	×		×	×
71.	(Nathan Wissner	Westchester	12/27/50	7/ 9/55	×			×
72.	(Calman Cooper	Westchester	12/27/50	9/ 8/55	×		×	×
73.	(Clarence Reed	N. Y.	12/ 2/54	9/ 8/55	×		×	×
74.	(Edward Nichols	N. Y.	12/ 2/54	9/ 8/55	×		×	×
75.	William Byers	N. Y.	2/10/55	1/12/56	×	×	×	
76.	Norman Roye	N. Y.	3/ 4/55	1/19/56	×		×	
77.	John Francis Roche	N. Y.	11/30/54	1/26/56	×		×	
78.	Ernest Edwards	Kings	4/ 4/55	6/28/56	×		×	
79.	Frank J. Newman	Nassau	12/12/55	8/23/56	×	×	×	
80.	Joseph Reade	Chautauqua	12/ 2/55	8/30/56	×		×	
81.	Leonard Salemi	N. Y.	6/24/53	2/28/57				
82.	MacDonald Browne	Bronx	3/ 8/56	3/14/57	×		×	
83.	Miguel Santiago	N. Y.	12/17/56	8/15/57	×		×	
84.	David Taylor	Bronx	4/27/56	11/21/57	×		×	
85.	Elmer Burke	N. Y.	12/16/55	1/ 9/58			×	
86.	Nicholas Dan, Jr.	Niagara	6/21/57	7/ 3/58	×		×	
87.	Angelo LaMarca	Nassau	12/14/56	8/ 7/58	×		×	
88.	Virgil Richardson	Queens	5/ 3/57	11/20/58	×		×	
89.	Edward Eckwerth	Westchester	2/13/57	5/22/59	×	×	×	
90.	(Jackson Turner, Jr.	Queens	12/27/57	7/16/59	×		×	
91.	(Ralph Dawkins	Queens	12/27/57	7/16/59	×		×	×

TABLE II (Continued)

Last 100 New York State Defendants Executed Before *Mapp* v. *Ohio*

	Defendant	County of Conviction	Date of Conviction	Date of Execution	Evidence at trial included: (A) Tangible evidence obtained by police	(B) Observations by police during a search	(C) Defendant's statements to police	(D) Identification of defendant at police station
92.	Leroy Keith	Bronx	1/31/58	7/23/59	×			
93.	Ivory Mason	N. Y.	4/ 7/59	1/14/60			×	
94.	Pablo Vargas	N. Y.	1/23/59	5/12/60	×	×	×	
95.	(Henry Flakes	Erie	3/ 6/59	5/19/60	×		×	×
96.	(Walter T. Green	Erie	3/ 6/59	5/19/60	×		×	×
97.	Willard Phillips	Nassau	10/17/58	6/23/60	×		×	
98.	Ronald Chapman	N. Y.	11/30/59	12/ 7/60	×	×	×	
99.	Ralph Downs	Bronx	11/23/59	1/ 5/61			×	×
100.	Woodrow Miller	Kings	6/ 7/60	6/ 8/61	×	×	×	

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1. **Peter De Lutro**, convicted (N. Y.) Nov. 8, 1943, conviction affirmed 292 N. Y. 683 (1944), executed June 29, 1944.

Felony murder; shooting during poolroom robbery.

A police officer, unaware of the robbery, saw the defendant and two accomplices entering a car suspiciously, and commanded them to stop. They shot at him, left their car and ran off. The officer searched the vehicle, finding a cartridge shell (*A*), and property of the deceased (*A*). During a subsequent investigation of the felony murder, an accomplice confessed and implicated the defendant. The defendant was picked up, was questioned at the police station, and confessed (*C*). The accomplice and other eyewitnesses testified against him at trial.

2. 3. **Lew York Hing** and **Yun Tieh Li**, convicted (N. Y.) Dec. 21, 1943, convictions affirmed 293 N. Y. 742 (1944), executed Aug. 31, 1944.

Felony murder; robbery-strangling of a prostitute in a hotel room.

Defendant Lew York Hing's signature appeared in the hotel's register for the room of the murder. He was arrested in Norfolk, Virginia, whereupon he tried to conceal his identity from the police, supporting his claim with falsified identification cards (*A*). He later confessed (*C*). Defendant Yun Tieh Li was arrested on "confidential information," and also confessed (*C*). At trial, four accomplices testified against the defendants, hotel employees es-

tablished their presence in the room on the night of the homicide, and articles of the defendants' clothing, used to strangle the deceased and found around her neck, were introduced.

4. 5. **Helen Fowler** and **George F. Knight**, convicted (Niagara) Feb. 11, 1944, convictions affirmed 293 N. Y. 721 (1944), executed Nov. 16, 1944.

Felony murder; hammer-slaying of an old man during a robbery in defendant Fowler's apartment.

The deceased's body was found in the river six weeks after his disappearance. While sifting through the ashes in the stove of defendant Fowler's apartment, and examining the garbage can outside, the police found an eyeglass piece (*A*) belonging to the deceased, three metal buttons (*A*) from the cap he was wearing when he disappeared, a certain hook device (*A*), similar to the hook on the deceased's suspenders, and a button (*A*) from the deceased's trousers. The police took photographs of the unoccupied apartment, which were introduced at trial (*B*). The defendants confessed after arrest (*C*). At trial, defendant Fowler's three children described the assault, and a witness testified that the victim entered defendant Fowler's apartment in her company.

6. **Oliver Little,** convicted (N. Y.) Apr. 20, 1945, conviction affirmed 295 N. Y. 656 (1945), executed Jan. 17, 1946.

Felony murder; stabbing during a street robbery.

The conviction was based on the testimony of three friends of the defendant who witnessed the crime.

7. **George W. Donaldson,** convicted (Rensselaer) June 25, 1945, conviction affirmed 295 N. Y. 158 (1946), executed Mar. 7, 1946.

Common law murder; bludgeoning of the defendant's supervisor at their place of employment, a county tuberculosis sanitarium.

The deceased's bloodstained coat was found two days after his last appearance at work. The defendant, who had recently quarreled with the deceased, was called to the superintendent's office for questioning by the police. After interrogation in the office, and at the state police barracks, the defendant admitted killing the deceased with an iron pipe (*C*). He took the police to the buried body, recovered the pipe (*A*), showed where he had buried certain of the deceased's possessions (*A*), and went with the police to his own room, where he revealed the deceased's watch and keys (*A*) sewn in a pillow. The defense of insanity was raised at trial.

8. **Abraham Gold**, convicted (Kings) June 18, 1945, conviction affirmed 295 N. Y. 772 (1946), executed Apr. 25, 1946.

Common law murder; the defendant's wife was burned to death in the bathroom of their apartment.

The dying victim accused her husband of the crime. At the police station, the defendant confessed that he poured carbolic acid and kerosene over his wife and ignited the fuel (*C*). A gallon can containing the chemicals (*A*) was obtained from the apartment.

9. **Louis Brookins**, convicted (Monroe) Oct. 9, 1945, conviction affirmed 296 N. Y. 544 (1946), executed Sept. 12, 1946.

Felony murder; killing in the course of a rape and robbery.

On the night after the murder, the police went to a hotel room at which the defendant and a woman companion were staying, and took him into custody. His luggage, which was taken to headquarters, contained bloodstained clothing (*A*). The defendant acknowledged wearing these clothes when he killed the deceased (*C*). Also among the luggage was clothing (*A*) that the defendant admitted buying with the victim's money after the crime (*C*). A ring (*A*) that he gave to his companion was identified as the deceased's.

10. 11. 12. **Henry P. Suckow, Edward Kahkoska** and **Edward Koberski,** convicted (Queens) July 24, 1946, convictions affirmed 296 N. Y. 817 (1947), executed Mar. 6, 1947.

Felony murder; shooting of one of two robbery victims who had been sleeping in a parked car.

Twelve days after the crime, detectives picked up defendant Koberski at his home, and went with him to the home of defendant Kahkoska. The latter led a detective to a closet, and produced a revolver (*A*), the murder weapon, from a pocket of a jacket. The officer removed two bullets (*A*) from the jacket. Thereafter, defendant Suckow was taken into custody. At the police station, the three defendants gave incriminating statements (*C*). The surviving holdup victim testified against the defendants at trial.

13. 14. **Arthur Johnson** and **William Washington,** convicted (Kings) Aug. 1, 1946, convictions affirmed 296 N. Y. 888 (1947), executed April 17, 1947.

Felony murder; rape-slaying of a fifteen-year-old girl.

Defendant Washington was taken into custody five months after the crime. He named defendant Johnson as the one who attacked the girl; allegedly, Washington merely stood watch outside (*C*). Subsequently, Washington admitted helping Johnson drag the girl into a nearby building, and raping her himself, but maintained that Johnson had choked the girl to death (*C*). At the trial, a cousin of defendant Johnson testified that on the day after the

crime, Johnson had admitted to him that he and Washington had raped the girl, and that Johnson had then choked her. This witness also described defendant Johnson's admissions to him.

15. **Ward Beecher Caraway**, convicted (Nassau) Dec. 18, 1946, conviction affirmed 296 N. Y. 1035 (1947), executed July 3, 1947.

Common law murder; shooting of a housewife during a robbery.

Picked up and questioned by the police a week after the crime, the defendant made substantial admissions (*C*), and showed the police where he had hidden the murder weapon (*A*). At trial, the People introduced a letter (*A*) written by the defendant after the crime to his mother in North Carolina, in which the defendant asked her to telegraph him requesting his return home.

16. **Salvatore DiCristofaro**, convicted (Erie) Nov. 29, 1946, conviction affirmed 297 N. Y. 455 (1947), executed July 10, 1947.

Common law murder; shooting and bludgeoning to obtain the victim's car and money.

The deceased's body was found in a quarry eleven days after the crime. The defendant was picked up at his home twelve days later, and under questioning admitted that he had heard of the deceased and had seen his car. Apparently acting upon information from the deceased's brother that the murder weapons were in the defendant's home,

officers searched the premises; possibly, the defendant's wife consented to the search. The police obtained several bloodstained items: scrapings from the attic floor (*A*); portions of the attic floor (*A*), the attic door (*A*) and the front door (*A*); and sandpaper found in the attic (*A*). Photographs of the interior of the premises were taken, and were later used at trial (*B*). The defendant confessed the crime (*C*).

17. 18. **Edward N. Jones** and **Arnold Sims**, convicted (Kings) Apr. 22, 1946, convictions affirmed 297 N. Y. 459 (1947), executed July 10, 1947.

Felony murder; shooting of a storekeeper.

The defendants were arrested separately several months after the crime, apparently on information supplied by an accomplice. The defendants gave substantial admissions (*C*), and at trial the accomplice and the victim's wife described the defendants' participation in the murder.

19. **William James Thomas**, convicted (N. Y.) Dec. 11, 1946, conviction affirmed 296 N. Y. 1018 (1947), executed July 10, 1947.

Common law murder; shooting of a policeman whom the defendant and his accomplices came upon as they were enroute to execute a robbery.

Police officers obtained the defendant's address from his accomplices, found the premises unoccupied, but questioned a friend of the defendant who appeared there. The defendant's friend accompanied the police to his own home,

where a search revealed the murder gun (*A*). The police later arrested the defendant at his apartment, and he confessed at the police station (*C*). An accomplice and another eyewitness testified against him at trial.

20. **Webster Daniel**, convicted (N. Y.) Jan. 28, 1947, conviction affirmed 297 N. Y. 538 (1947), executed Aug. 21, 1947.

Common law murder; shooting of a policeman who pursued the defendant from the scene of a robbery.

The defendant fatally shot one of two policemen who chased him as he fled with the proceeds of a holdup. Officers nearby heard shots, saw the defendant running with something in his hand, and apprehended him. The other policeman, who had witnessed the killing of his partner, promptly arrived, and seized a bag of stolen property (*A*) from the defendant. A gun, later established as the murder weapon, was found along the defendant's route.

21. **Enix Bussey**, convicted (N. Y.) Mar. 24, 1947, conviction affirmed 297 N. Y. 627 (1947), executed Dec. 4, 1947.

Common law murder; separate killings, by strangulation and beatings, of two laundry proprietors, whom the defendant and his girl friend robbed pursuant to a common plan.

The police issued an alarm for certain property believed to have been stolen from the victims. The defendant and the girl were arrested by Buffalo police, at the

request of the New York police, and their room in Buffalo was searched, apparently by Buffalo police officers. The search produced a radio (*A*) and watch (*A*) belonging to the victims; a pawn ticket (*A*) for jewelry that belonged to the deceased; defendant Bussey's appointment-memorandum book (*A*) with incriminating notations referring to the date of the murders, indicating a plan to rob the victims; and a handwritten receipt (*A*) for a large amount of cash that the defendant had entrusted to someone soon after the murders. The defendant gave a confession to New York police officers (*C*). The girl was convicted at the same trial, and was sentenced to life imprisonment.

22. **Jauvhan Jackson**, convicted (Kings) Apr. 7, 1947, conviction affirmed 297 N. Y. 727 (1947), executed Jan. 8, 1948.

Felony murder; shooting during a payroll robbery. A co-defendant at the trial was convicted and sentenced to life imprisonment.

On the evening of the crime, police searched an apartment occupied by the two defendants, and found the murder weapon (*A*), and a blue naval officer's raincoat (*A*), its belt missing. A belt found at the scene of the crime matched the raincoat. The defendant first denied that the gun was his, but later admitted ownership, and acknowledged that he had fired the fatal shot (*C*).

23. **Anthony R. Papa**, convicted (Nassau) Oct. 22, 1947, conviction affirmed 297 N. Y. 974 (1948), executed July 1, 1948.

Common law murder; slaying of the five-year-old daughter of the defendant's neighbor.

Several hours after the body was discovered, the police picked up the defendant at his house, and took along a bloodstained sweater (*A*), which the defendant acknowledged was his (*C*). An officer later returned, and removed from the defendant's premises several other bloodstained garments: a pair of undershorts (*A*), an undershirt (*A*), and a pair of dungarees (*A*). The defendant admitted owning them, and confessed the crime (*C*). At trial, he claimed insanity.

24. 25. **Lester Haughton** and **George C. Moore**, convicted (Bronx) April 14, 1947, convictions affirmed 297 N. Y. 734 (1947), executed July 22, 1948.

Felony murder; shooting of a policeman during a liquor store robbery.

Friends of the defendants to whom the defendants had made admissions related this information to the police. Defendant Moore was apprehended, and confessed when confronted with the informants (*C*). Moore directed one of the informants to give the police the murder weapon, which Moore had entrusted to another friend. Pursuant to these directions, the informant, accompanied by the police, retrieved the gun (*A*) and brought it to the police station, where Moore identified it (*C*). Moore implicated defend-

ant Haughton, who was then taken into custody. He confessed (*C*) when confronted with Moore. The informants testified at trial.

26. 27. **Milton Shaket** and **John Reilly**, convicted (N. Y.) Nov. 19, 1947, convictions affirmed 297 N. Y. 930 (1948), executed Sept. 16, 1948.

Felony murder; shooting during a robbery in a bar.

A police officer near the scene, unaware of the crime, observed a man on the street shouting "stop" and pointing to a taxicab. The officer intercepted the cab, and was shot at by its occupants, the defendants. They were captured, and two guns (*A*), one of them the murder weapon, were found in the cab. At trial, eyewitnesses described the defendants' participation.

28. **Harris Gray**, convicted (N. Y.) Mar. 10, 1948, conviction affirmed 298 N. Y. 699 (1948), executed Jan. 6, 1949.

Common law murder; shooting of a policeman.

The defendant broke into an unoccupied house, then shot and killed one of two police officers who had come to investigate a report of prowling. The second officer and another patrolman wounded the defendant, and found the murder gun (*A*) near him, whereupon the defendant confessed (*C*).

29. **Louis Smiley**, convicted (N. Y.) Mar. 15, 1948, conviction affirmed 298 N. Y. 716 (1948), executed Jan. 13, 1949.

Common law murder; after the defendant and the rest of a group of men raped a young woman on a rooftop, the defendant pushed her off of the roof.

The defendant was arrested, apparently after a member of the group pointed him out to the police and informed them that the defendant had been on the roof. At the police station, the defendant was ordered to place the contents of his pockets on a table (*B*). While the defendant was being questioned, the police secretly placed a Mexican coin among his effects. Asked about the coin, the defendant said that it was his. When an officer revealed that the coin had been found at the scene, the defendant gave substantial admissions (*C*). Three co-defendants testified against him at trial.

30. **Eugene Pannell**, convicted (N. Y.) April 23, 1948, conviction affirmed 298 N. Y. 705 (1948), executed Jan. 20, 1949.

Felony murder; shooting of a patron of a brothel during a robbery.

An accomplice and other eyewitnesses established the defendant's guilt. Accomplices **Grant** and **Monge**, *infra* Nos. 31, 32, were convicted at a separate trial.

31. 32. **Willie Grant** and **George Louis Monge**, convicted (N. Y.) June 26, 1947, convictions affirmed 297 N. Y. 759 (1948), executed Jan. 20, 1949.

Felony murder; shooting of a patron of a brothel during a robbery. Accomplice **Pannell**, *supra* No. 30, was convicted at a separate trial.

Defendant Grant was taken to the police station, where an eyewitness identified him as one of the robbers (*D*). Grant was then charged with homicide, and later made admissions (*C*). Defendant Monge, implicated by Grant and others, was arrested, was identified in a lineup (*D*), and acknowledged being present at the scene (*C*). Accomplices and other eyewitnesses testified against the defendants at trial.

33. 34. **Santo Bretagna** and **William Rosenberg**, convicted (N. Y.) July 7, 1948, convictions affirmed 298 N. Y. 323 (1949), cert. denied 336 U. S. 919 (1949), executed Mar. 3, 1949.

Common law murder; shooting from ambush.

An informant, arrested on another charge, told the police that before the murder the defendants had been talking about harming the deceased; that later defendant Bretagna had confessed the murder, and that Bretagna had implicated defendant Rosenberg. Defendant Bretagna was arrested, and he confessed when confronted with the informant (*C*). Defendant Rosenberg was apprehended, and he confessed when confronted with Bretagna (*C*).

The informant testified at trial, and the defendants' purchase of a gun, their plotting, and their flight were proved by other witnesses.

35. 36. **Herman Dupree** and **Harold Dupree**, convicted (N. Y.) Dec. 9, 1948, convictions affirmed 299 N. Y. 630 (1949), executed June 30, 1949.

Felony murder; shooting during robbery of a speakeasy.

The defendants, brothers, were arrested, apparently on information from an acquaintance, who had seen them leaving the scene, and who had observed one of the defendants outside, acting in the manner of a lookout. Both defendants falsely denied having been at the scene (*C*). At trial, persons who were in the premises established one defendant's participation, and other proof established the second defendant's flight after the crime.

37. 38. **John Dunn** and **Andrew Sheridan**, convicted (N. Y.) Jan. 19, 1948, convictions affirmed 298 N. Y. 564 (1948), cert. denied 336 U. S. 946 (1949), executed July 7, 1949.

Common law murder; shooting from ambush.

Before dying, the wounded victim identified the defendants as his assailants; they were arrested. One defendant made admissions to a fellow prisoner in jail. The defendants' flight and getaway plans were also proved at trial.

39. 40. **William M. Jackson** and **Floyd Arrington**, convicted (N. Y.) Dec. 21, 1948, convictions affirmed 299 N. Y. 732 (1948), executed Sept. 1, 1949.

Felony murder; strangling of a taxicab driver during a robbery.

Defendant Jackson was arrested two days after the killing, made admissions (*C*), and was taken to his apartment, where the police obtained a housecoat (*A*) matching the belt with which the deceased was choked. Jackson named defendant Arrington, who was in the apartment, as his confederate; Arrington was arrested and he confessed at the police station (*C*). The police returned with Jackson to his apartment, where they found a Mass card belonging to the deceased (*A*), and Jackson produced from hiding the deceased's wallet (*A*). Fingerprints taken of Arrington while he was in custody (*A*) matched prints found on the cab. At trial, Jackson confessed, and Arrington admitted the robbery.

41. **Walter Davis**, convicted (Kings) Jan. 7, 1949, conviction affirmed 299 N. Y. 745 (1949), executed Sept. 8, 1949.

Common law murder; stabbing of an old woman.

Five days after the killing, the police went to the defendant's apartment and took him in for questioning. When the defendant stated that he had sent some clothing to a cleaner for removal of blood spots that he had acquired during a street fight, the police obtained the bloodstained

garments (*A*). The defendant confessed the crime (*C*), and described where he had thrown the murder knife (*A*), which was then recovered.

42. **Frank Bruno**, convicted (Kings) Feb. 10, 1949, conviction affirmed 300 N. Y. 511 (1949), executed Jan. 5, 1950.

Common law murder; shooting.

The defendant, while serving a sentence on another charge, was questioned by detectives about the crime in question, and confessed (*C*). An accomplice testified against him at trial.

43. **George Peter Reeh**, convicted (N. Y.) June 6, 1949, conviction affirmed 300 N. Y. 543 (1949), executed Jan. 12, 1950.

Felony murder; shooting of a store employee during a robbery.

An informant with a prior criminal record, arrested on a charge unrelated to the felony murder, told the police that the defendant had confessed the murder to him. The defendant was arrested, and he confessed (*C*). The informant, another acquaintance to whom the defendant confessed, and an accomplice testified at trial.

44. **Julio R. Perez**, convicted (N. Y.) Nov. 23, 1948, conviction affirmed 300 N. Y. 208 (1949), cert. denied 328 U. S. 952 (1950), executed June 25, 1950.

Felony murder; stabbing during a robbery at the deceased's apartment.

The police discovered in a pawnshop a raccoon coat and other property matching the description of property robbed from the deceased. A detective saw the defendant leaving the pawnshop with the coat, and stopped and questioned him, but the defendant struck the officer, and fled. The detective apprehended him and seized the coat (*A*). At the police station, he found on the defendant's person a fountain pen bearing the name of the deceased's husband (*A*). The defendant initially gave false explanations of his possession of the stolen property, but later confessed (*C*). The defendant's uncle acknowledged to the police that he had received a screwdriver, the murder weapon, from the defendant. The uncle produced the screwdriver (*A*) at his home, together with property of the deceased (*A*).

45. **Harley G. LaMarr**, convicted (Erie) April 17, 1950, conviction affirmed 301 N. Y. 762 (1950), executed Jan. 11, 1951.

Felony murder; shooting in the course of rape and robbery.

After the crime, the unidentified bandit drove off in the deceased's car, and abandoned it a few blocks from the defendant's apartment. Police recovered the car, and found

in it a belt belonging to the deceased and a rifle, the murder weapon. They later apprehended the defendant at his home, searched his room, and found bloodstained clothing (*A*) and the keys to the deceased's car (*A*). The defendant made admissions at the time of his apprehension, and confessed in the police station (*C*). Witnesses who saw him in the vicinity of the crime testified at trial.

46. **Willie W. Bunch**, convicted (Nassau) Feb. 10, 1950, conviction affirmed 302 N. Y. 595 (1951), executed Feb. 15, 1951.

Felony murder; hammer-slaying during a gas station robbery.

After learning that on the night of the killing the defendant was in the company of the deceased at the gas station, the police accompanied the defendant to the precinct house. Officers removed blood sediments from the defendant's fingernails (*B*). Detectives searched the defendant's home, and obtained bloodstained clothing (*A*). Confronted with this clothing, the defendant confessed, and retracted a false alibi (*C*). At trial, witnesses established that the defendant had no money before the killing, but that afterwards he spent an amount equal to the stolen money.

47. **Gilberto C. Walker**, convicted (N. Y.) June 27, 1950, conviction affirmed 302 N. Y. 565 (1951), executed Mar. 1, 1951.

Felony murder; shooting in a robbery of a grocery store.

An accomplice was apprehended, confessed, and implicated the defendant, who was then arrested. An eyewitness identified the defendant in a police lineup (*D*), and he confessed (*C*). The defendant led the police to the home of a friend, where, at the defendant's direction, she produced the murder weapon (*A*).

48. 49. **John J. King** and **Richard Power**, convicted (Queens) June 29, 1950, convictions affirmed 302 N. Y. 572 (1951), executed March 8, 1951.

Felony murder; shooting during a robbery of a motorist.

Witnesses saw three men fleeing from the scene, a street in Queens. A private citizen recovered the murder weapon from a lawn near the scene. Subsequently, a radio patrol officer in Westchester, unaware of the crime, followed and stopped a car occupied by the defendants. He took defendant Power into custody, upon Power's failure to produce the automobile registration. Queens police, whose investigation had led them to believe that the defendants and a certain accomplice had committed the killing, learned of Power's apprehension from the accomplice, and arranged Power's transfer to Queens. Defendant King was also

apprehended. The defendants confessed (*C*), identified the murder gun, and directed the police to another weapon (*A*), which the defendants had used in the robbery, and had thrown from the car in Westchester when followed by the police.

50. 51. **Raymond Fernandez** and **Martha Beck**, convicted (Bronx) Aug. 22, 1949, convictions affirmed 301 N. Y. 302 (1950), cert. den. 340 U. S. 914 (1951), executed March 8, 1951.

Common law murder; beating with a hammer, and strangling, of an old widow.

After the killing, the defendants went to Michigan, where they took up residence with another widow. When this widow was reported missing, Michigan police went to her house, and brought the defendants to the police station for questioning. Michigan officers took from the house personal papers of the New York widow (*A*), and a rent receipt (*A*) for rooms that the defendants had rented at the New York widow's home. At the Michigan police station, officers seized the New York widow's ring (*A*) from defendant Beck. The defendants confessed to killing both women (*C*). At trial, witnesses established that the defendants had been with the New York widow shortly before her death.

52. **John Saiu,** convicted (Bronx) June 30, 1950, conviction affirmed 302 N. Y. 636 (1951), executed April 12, 1951.

Common law murder; strangling of an eight-year-old boy with a leather belt, in a park.

The defendant was arrested, and on his person were a pencil (*A*) and a Canadian coin (*A*). The defendant confessed (*C*), and stated that he had befriended the deceased in the park, had shown him coin tricks, and had given him a pencil. Playmates of the deceased testified at trial that the defendant and the deceased were together shortly before the crime.

53. **Bernard Stein,** convicted (N. Y.) Nov. 6, 1950, conviction affirmed 302 N. Y. 915 (1951), executed Feb. 6, 1952.

Felony murder; shooting during a robbery in a bar.

Accomplices **Shaket** and **Reilly,** *supra* Nos. 26, 27, were apprehended immediately. The police obtained information that the defendant, who escaped, had been in close contact with them before the crime. Three years after the murder, a detective received information that the defendant was working in Chicago. The officer arrested him there, identifying him from a photograph. The defendant claimed another identity (*C*), but acknowledged his true name after the officer searched him and found pictures of his family (*A*). Also on the defendant's person were identity cards under a false name (*A*). The officer and the defendant went to a Chicago bank, and opened the

defendant's safe deposit box, which contained several other false identification papers (*A*), and $2000 cash (*B*), which the defendant claimed to have earned. Eyewitnesses to the murder later identified the defendant in a lineup in New York (*D*).

54. **Wallace Ford**, convicted (Genesee) Dec. 4, 1951, conviction affirmed 304 N. Y. 679 (1952), executed Oct. 30, 1952.

Common law murder; the deceased, the defendant's sister-in-law, was struck on the head with a rock, then run over with a car.

The police spoke to the defendant at his home two days after the killing, and asked him where the car was that he had been driving on the day of the crime. The car belonged to the deceased's brother; the defendant had borrowed it for a few days. The defendant pointed it out, and the police drove the defendant and the car to the police station. While the defendant was at the station house, specimens of hair (*A*) and cloth (*A*) were taken from the car, and were later proved to match the deceased's hair and clothing. The defendant confessed to the crime (*C*). At trial, witnesses testified that they saw the defendant driving the car near the scene of the crime. The defendant claimed insanity.

55. **Edward H. Kelly**, convicted (Ulster) Oct. 2, 1950, conviction affirmed 304 N. Y. 662 (1952), executed Oct. 30, 1952.

Common law murder; shooting of the defendant's ex-fiancee with a rifle.

Witnesses saw the defendant shoot the deceased on the street, then shoot himself. A box of shells (*A*) was taken from the defendant's jacket pocket while he lay on the pavement, and a shell (*A*) and slug (*A*) were removed from his pockets as he lay in the hospital emergency room. The defense at trial was insanity.

56. **Joseph Paonessa**, convicted (Dutchess) June 15, 1951, conviction affirmed 303 N. Y. 964 (1952), cert. den. 344 U. S. 860 (1952), executed Jan. 15, 1953.

Common law murder; shooting of a young boy.

Two months after the killing, the defendant was brought to the police station for questioning, and was released. A few days later, the police obtained the murder weapon (*A*) at a co-defendant's home. The defendant was apprehended. Confronted with proof of his absence from work on the day of the murder, the defendant made certain admissions (*C*). He confessed (*C*) when confronted with the co-defendant and the murder weapon.

57. **Frank Wojcik**, convicted (Wyoming) May 13, 1952, conviction affirmed 305 N. Y. 551 (1953), executed April 16, 1953.

Common law murder; double shotgun slayings of the defendant's wife and her brother, at the defendant's farm.

A hired hand heard the three principals arguing. There was a shot, the defendant's wife shouted "My poor brother, Leo. You have shot him," and there was another shot. The witness rushed into the room, saw the bodies, and noticed the defendant's shotgun (*A*), the murder weapon. The defendant's car was seen leaving the premises. Soon after, the defendant appeared at his son's home, and confessed the killings to him. After the defendant's arrest the same day, he confessed to the police (*C*). Shotgun slugs (*A*) were recovered at the scene. At trial, one of the defenses was insanity.

58. **Donald H. Snyder**, convicted (Putnam) Sept. 22, 1952, conviction affirmed 305 N. Y. 790 (1953), executed July 16, 1953.

Felony murder; stabbing of a little girl whom the defendant, an escaped convict, held hostage while he was surrounded by police.

The police immediately closed in and seized the murder knife (*A*) from the defendant's hand. He confessed (*C*), and at trial the victim's mother and other eyewitnesses described the crime.

59. **William Draper,** convicted (Monroe) May 6, 1952, conviction affirmed 304 N. Y. 799 (1952), cert. denied 345 U. S. 944 (1953), executed July 23, 1953.

Felony murder; strangling and beating of an old woman during an attempted rape.

The deceased was last seen alive in the evening, leaving a tavern with the defendant. Her body was found the next morning. In a field some distance form the corpse were the deceased's girdle, her hat, and the defendant's billfold. Strewn about the area were other clothing and personal effects of the deceased, including portions of a necklace of beads that the deceased had worn the day before. The defendant was arrested that evening, while he was driving in his car with his family. He was taken into custody in a police vehicle, while his car was taken to the county morgue for examination. Beneath the front seat of the car were beads (*A*) matching the deceased's necklace. The defendant made two statements, one exculpatory, the second inculpatory (*C*). Introduced at trial was a photograph of the interior of defendant's car (*B*), showing the beads under the seat.

60. 61. **Maurice O'Dell** and **Walter Griffen,** convicted (Erie) May 1, 1953, convictions affirmed 306 N. Y. 627 (1953), executed Jan. 7, 1954.

Felony murder; shooting during a jewelry store robbery.

After the crime, the defendants left part of the booty, and a gun that was used in the robbery, with a friend, but

the bailee became frightened, gave these items to the police, and disclosed the defendants' identities and addresses. The police apprehended defendant O'Dell at his room, seized the watch that he was wearing (*A*), one of the stolen items, and took from his girl friend, who was also in the room, a ring (*A*) also stolen during the robbery. At the police station, defendant O'Dell admitted giving the ring to the girl, but lied about its source (*C*). The police arrested defendant Griffen at his apartment, and seized from a table next to his bed a wrist watch (*A*) that was taken during the robbery. Eyewitnesses identified the defendants at trial, and defendant Griffen confessed on the witness stand.

62. 63. **Henry Lewis Allen** and **John Martin**, convicted (Kings) July 15, 1953, convictions affirmed 306 N. Y. 727 (1954), executed March 11, 1954 and July 15, 1954.

Common law murder; killing of a storekeeper with a meat cleaver and knife.

The defendants were taken into custody separately several hours after the discovery of the deceased's body. Both defendants confessed (*C*). Defendant Martin led the police to a roof, where one of the weapons, a meat cleaver stained with human blood (*A*), was hidden. The bloodstained shoes that Martin was wearing (*A*) were also seized. The defendants stated that after the murder they went to Martin's room, cleaned up, and ate ice cream that they had stolen from the deceased's store. A search of Martin's room disclosed a bloodstained cap (*A*), which

Martin acknowledged wearing during the killing, Allen's bloodstained trousers (*A*), which he identified, and an empty ice cream carton (*A*).

64. **Emile Hendricka Scott**, convicted (N. Y.) Oct. 19, 1953, conviction affirmed 307 N. Y. 663 (1954), executed July 15, 1954.

Common law murder; shooting of a policeman as the defendant fled by car from a liquor store that he had robbed.

The fatally wounded officer shot the defendant, who abandoned the getaway car and ran. In the vehicle, which was registered to the defendant's wife, were $170 in bills (*A*), and a fired cartridge shell (*A*). When a neighbor of the defendant acknowledged that the defendant recently had been to the neighbor's home, the police searched the premises and found the murder weapon (*A*). They later arrested the defendant, and found $25 in bills on his person (*B*). Several witnesses to the shooting identified him at the police station (*D*). The defendant was taken to the hospital, where a bullet (*A*), later traced to the deceased officer's gun, was removed from the defendant's arm.

65. **William Vanderwyde**, convicted (N. Y.) Apr. 30, 1952, conviction affirmed 304 N. Y. 937 (1953), cert. denied 345 U. S. 959 (1953), executed July 22, 1954.

Common law murder; shooting of a longshoreman hiring boss.

A passing police officer witnessed the crime, chased and apprehended the defendant, retrieved the murder weapon, a .38 calibre gun that the defendant threw away, and found on the defendant's person ten loaded .38 calibre cartridge shells (*A*) of the same make and type as the fatal bullet. The defendant's clothing matched that of an unidentified person who was known to have visited the deceased a few moments before the murder.

66. 67. **John Dale Green** and **Barry Jacobs**, convicted (Bronx) Jan. 8, 1953, convictions affirmed 306 N. Y. 717 (1954), cert. denied 347 U. S. 1019 (1954), executed Aug. 26, 1954.

Felony murder; shooting during an attempt to steal an automobile.

Defendant Jacobs was arrested shortly after the crime, on the roof of a nearby building. He confessed, and named defendant Green as his confederate (*C*). The police arrested Green at his home, and took from the premises a stocking (*A*), which Green later admitted he had tried to pull over his face during the crime (*C*). At trial, a witness identified defendant Jacobs as one of the fleeing bandits. Descriptions supplied by other witnesses matched the

two defendants. Also adduced were the murder gun, which had been found in the street along Jacob's escape route, and a pair of sunglasses, which had been found in the automobile, and was traced to Jacobs.

68. **Henry Matthews**, convicted (N. Y.) Apr. 8, 1954, conviction affirmed 308 N. Y. 696 (1954), executed Feb. 10, 1955.

Felony murder; stabbing during a robbery in an apartment.

Friends of the defendant informed the police that he had confessed the crime, and co-defendants whom the police arrested also implicated him. The defendant made admissions after his arrest (*C*).

69. **Romulo Rosario**, convicted (N. Y.) May 14, 1954, conviction affirmed 308 N. Y. 723 (1954), executed Feb. 17, 1955.

Common law murder; shooting.

A police officer on the street heard shots, observed people running from a restaurant, and saw the defendant carrying what appeared to be a gun. The officer ordered him to stop, and the defendant threw down the weapon (*A*), which was proved to be the murder gun. In his hand were three empty shells (*A*), in his pocket five live cartridges (*A*). The defendant confessed his guilt (*C*), and at trial eyewitnesses described his assault upon the deceased.

70. 71. 72. **Harry A Stein, Nathan Wissner** and **Calman Cooper**, convicted (Westchester) Dec. 27, 1950, convictions affirmed 303 N. Y. 856 (1952), affirmed 346 U. S. 156 (1953), rearg. denied 307 N. Y. 253 (1954), executed July 9, 1955 and Sept. 8, 1955.

Felony murder; shooting during a hijacking of a Reader's Digest truck.

The driver of the truck, who witnessed the slaying of his partner, described to the police the participation of the three defendants and their accomplice; all were unidentified. During an extensive investigation, a rented truck used by the robbers was traced to defendant Cooper, an ex-convict, who was known to have conversed with a fellow prisoner about robbing the Reader's Digest, during his last imprisonment. Two months after the crime, the lessor of the truck identified Cooper on the street for the police, and Cooper was arrested. He confessed (*C*), implicated the other three participants, and revealed that the proceeds of the robbery had been taken to the home of the accomplice in valises. Defendant Stein was arrested at about the same time, and made a similar confession (*C*). Police then recovered a valise (*A*) from the accomplice's home; it contained a fragment of a discount certificate (*A*), which was proved to have been part of the stolen Reader's Digest shipment. The three defendants were identified by witnesses after their arrest (*D*). At trial, the driver of the truck, and the accomplice, identified the defendants, and described their participation in the felony murder. A weapon, money bags, and part of a disguise, which were discarded by the robbers near the scene, were introduced. Defendant Cooper raised the defense of insanity.

73. 74. **Clarence Reed** and **Edward Nichols**, convicted (N. Y.) Dec. 2, 1954, convictions affirmed 308 N. Y. 1038 (1955), executed Sept. 8, 1955.

Felony murder; shooting during a robbery at a crap game.

After witnesses to the crime picked out photographs of the defendants from a group of police pictures, the defendants were arrested. Defendant Nichols took the police to his apartment, where a search revealed a cartridge (*A*) that was fired from the same gun as the murder bullet. Defendant Nichols was identified at a lineup (*D*). Defendant Reed was arrested and searched. In his wallet was a photograph of himself wearing dark glasses (*A*), an appearance that matched the eyewitnesses' descriptions of one of the robbers. Defendant Reed was identified at a lineup (*D*), and he admitted that a hat found at the scene belonged to him (*C*), but gave the police a false alibi (*C*).

75. **William Byers**, convicted (N. Y.) Feb. 10, 1955, conviction affirmed 309 N. Y. 908 (1955), executed Jan. 12, 1956.

Common law murder; stabbing in the deceased's apartment. The deceased's daughter was convicted of second degree murder in the same proceedings.

After the crime, but before its discovery, the defendant married the deceased's daughter and moved in with her at the victim's apartment. Several weeks later, in response to the building superintendent's report of odors coming

from the apartment, a detective entered the empty premises from the fire escape, through an unlocked, partly open window. He found the deceased's body in the bathroom (*B*), and recovered the murder weapons (*A*). The daughter was arrested, confessed (*C*) and implicated defendant Byers, who was apprehended and also confessed (*C*). The defense of insanity was raised at trial.

76. **Norman Roye**, convicted (N. Y.) Mar. 4, 1955, conviction affirmed 309 N. Y. 903 (1955), executed Jan. 19, 1956.

Felony murder; strangling during a rape and robbery on the roof of a building.

Detectives interrogated residents of the building where the murder occurred, went with the defendant to the roof, and questioned him there. An officer observed blood stains on the defendant's trousers (*A*), asked him to roll up the cuffs, and saw bloodstains on his socks (*A*). The defendant thereupon confessed (*C*).

77. **John Francis Roche**, convicted (N. Y.) Nov. 30, 1954, conviction affirmed 309 N. Y. 678 (1955), executed Jan. 26, 1956.

Felony murder; stabbing and beating of a fourteen-year-old girl during a rape.

Three days after the crime, a patrolman saw a car facing in the wrong direction on a one-way street. The defendant was in the driver's seat, talking to another officer. The patrolman entered the car and ordered the

defendant, who had no motor vehicle license or registration, to drive to the police station. At the station, while the defendant was questioned about his activities for the last few days, the car was searched. The search disclosed a knife (*A*), a metal pipe (*A*), a sweater (*A*) and a pair of shoes (*A*), each stained with blood. The defendant confessed that he stole the car, murdered the deceased and deposited the evidence in the vehicle (*C*). At trial, he claimed insanity.

78. **Ernest Edwards**, convicted (Kings) April 4, 1955, conviction affirmed 309 N. Y. 1020 (1956), writ dismissed 352 U. S. 804 (1956), executed June 28, 1956.

Felony murder; beating of a Brooklyn fisherman with a lead pipe during a robbery.

The day after the crime, police officers in Manhattan stopped a car occupied by the defendant and his accomplice, apparently to question them about a recent assault in the neighborhood. When asked who owned the car, the defendant named his "buddy Englander"; this was the deceased's name (*C*). A search of the car produced a lead pipe (*A*), the murder weapon, which the defendant admitted was his (*C*). The car and its two occupants were taken to the police station. An officer removed from the vehicle certain fishing gear (*A*), and a wallet with the deceased's initials (*A*). The police also seized the clothes (*A*) that the defendant was wearing; these contained sand (*A*) of the type found at the scene of the crime. The accomplice testified against the defendant at trial.

79. **Frank J. Newman**, convicted (Nassau) Dec. 12, 1955, conviction affirmed 1 N. Y. 2d 875 (1956), executed Aug. 23, 1956.

Common law murder; rifle-slaying of the defendant's wife at their home.

The deceased's children witnessed the shooting. Apparently as a result of their statements to the police, the defendant was arrested in an outdoor telephone booth, two hours after the crime. The police took his car, which was parked across the street from the booth, searched the vehicle, and found a .22 calibre rifle (*A*), the murder weapon, on the front seat; a box of ammunition (*A*); a bullet; and a jacket (*A*) containing the defendant's correspondence with his life insurance company (*A*), indicating a desire to substitute his children for his wife as beneficiaries. The defendant admitted the shooting (*C*). A search of the Newman house revealed a fired .22 calibre cartridge (*A*) and two unfired cartridges (*A*). An officer observed a trail of blood (*B*) from the kitchen floor out to the yard where the body had been found. The defendant's purchase of the rifle and ammunition on the day of the murder was proved at trial. The defenses were intoxication, and insanity.

80. **Joseph Reade**, convicted (Chautauqua) Dec. 2, 1955, conviction affirmed 1 N.Y. 2d 459 (1956), executed Aug. 30, 1956.

Common law murders; strangling, beating and rape of the defendant's sister-in-law and her infant daughter.

The defendant remained alone in his brother's house with the victims when the brother left in the evening for work. The brother returned the next morning to find his wife and child murdered. There were no signs of burglary. The defendant, who had a record of prior arrests, was arrested that morning, spoke to the police, and confessed when confronted with the falsity of his story as to his activities of the night before (*C*). He led the police to a swamp where he had hidden the mother's pocketbook (*A*), her wallet (*A*), and the collar of the shirt he had worn during the murders, which he had ripped from the shirt because it bore the laundrymark "Reade" (*A*). The defendant and the police then went to the building where the defendant resided. In the common bathroom of the premises, outside of his apartment, was the rest of his shirt (*A*). In a garbage can in the alley was the defendant's blood-stained T-shirt (*A*), torn in half. At trial, the defendant alleged insanity.

81. **Leonard Salemi**, convicted (N. Y.) June 24, 1953, conviction affirmed 306 N. Y. 863 (1954), executed Feb. 28, 1957.

Common law murder; shooting in a bar.

Eyewitnesses identified the defendant from photographs at the police station, and one witness stated that the deceased had named the defendant as the killer before he died. The defendant surrendered ten weeks later.

82. **MacDonald Browne**, convicted (Bronx) March 8, 1956, conviction affirmed 2 N. Y. 2d 842 (1957), executed March 14, 1957.

Common law murder; stabbing of a youth.

Several witnesses saw the killing. The defendant was arrested on the same day, after an acquaintance identified him for the police. A knife (*A*), the murder weapon, was seized from his person. The defendant made substantial admissions (*C*). His defense at trial was insanity.

83. **Miguel Santiago**, convicted (N. Y.) Dec. 17, 1956, conviction affirmed 3 N. Y. 2d 809 (1957), executed Aug. 15, 1957.

Common law murder; shooting.

Two days after the killing, members of the defendant's family visited the police station, and a detective went with them to an apartment building where the family, but not the defendant, lived. At a detective's instruction, a rela-

tive of the defendant went upstairs and brought down a gun, the murder weapon (*A*). The officer then went up to the apartment, and found the defendant, who admitted killing the deceased with the gun (*C*). At trial, witnesses at the scene testified against the defendant, and others established the defendant's pre-crime statements that he planned to kill the deceased.

84. **David Taylor**, convicted (Bronx) April 27, 1956, conviction affirmed 2 N. Y. 2d 1009 (1957), executed Nov. 21, 1957.

Felony murder; strangling during a robbery.

The defendant was one of several lodgers in the deceased's apartment. When the body was found, certain property was missing from the premises, including a trunk and some suits of one of the other roomers, and a radio and other possessions of the deceased's son. The defendant did not return to the apartment after the crime. In a drawer of the room that he had occupied, the police found an employment application in the name of "Roy Benson" (*A*). The police recovered some of the stolen property, including the radio (*A*), at a certain pawnshop, where it had been pawned in the name of "Roy Benson."

Six months after the murder, a police officer stopped the defendant on the street. The defendant identified himself as "Roy Benson," but produced no identification. He agreed to accompany the officer to the station house. There, the defendant confessed that he had killed the deceased because she had interrupted him as he was stealing suits from the room of another boarder; he had spent the night of the

murder at a certain hotel, after registering as "Roy Benson," had pawned many of the stolen articles, and had left other items in the stolen trunk, which was still at the hotel (*C*). On the day after the defendant's arrest, the police went to the hotel, opened the trunk (*A*), and found some of the missing clothing (*A*), and three pawn tickets (*A*), which corresponded to other stolen items (*A*).

85. **Elmer Burke**, convicted (N. Y.) Dec. 16, 1955, conviction affirmed 1 N. Y. 2d 876 (1956), executed Jan. 9, 1958.

Common law murder; shooting during a fight in a bar.

The defendant made substantial admissions (*C*) to the police after his arrest, which followed his identification from police photographs by eyewitnesses. The defense of insanity was raised at trial.

86. **Nicholas Dan, Jr.**, convicted (Niagara) June 21, 1957, conviction affirmed 4 N. Y. 2d 934 (1958), executed July 3, 1958.

Felony murder; beating with a tire iron during a robbery. A co-defendant was convicted of manslaughter.

On the morning after the killing, the defendant was arrested for violation of probation. That day, police investigating the murder learned that the deceased was last seen leaving a bar and entering a car with the defendant and the co-defendant. Questioned about the murder, the defendant confessed (*C*) and directed the police to the home

of the owner of the car, a relative of the co-defendant. There, the police found the car, and on the floor of the vehicle found human hair (*A*), and residues of blood (*A*), which were traced to the deceased.

87. **Angelo LaMarca,** convicted (Nassau) Dec. 14, 1956, conviction affirmed, 3 N. Y. 2d 452 (1957), cert. denied 355 U. S. 920 (1958), executed Aug. 7, 1958.

Felony murder; abandonment of an infant who had been kidnaped for ransom.

The New York police and the FBI compared the ransom notes with two million specimens of handwriting. Six weeks after the kidnaping, a handwriting expert determined that a certain specimen was written by the author of the ransom notes. The New York police and the FBI connected the specimen with the defendant, arrested him, and seized a chauffeur's license (*A*) from him. At the police station, the defendant made certain writings for the police, and he confessed when confronted with a comparison between these writings and the ransom notes (*C*). At trial, witnesses testified that they had seen the defendant near the scene of the kidnaping. During cross-examination of the defendant, he was questioned about false information that he had supplied on his chauffeur's license.

88. **Virgil Richardson**, convicted (Queens) May 3, 1957, conviction affirmed 4 N. Y. 2d 224 (1958), cert. denied 357 U. S. 943 (1958), executed Nov. 20, 1958.

Common law murder; shooting of a policeman.

Police found the murder weapon, a revolver, at the scene. Several days after the crime, from information supplied by the manufacturer of the gun and certain public agencies, the police went to the defendant's residence, but learned that he was on his way to Atlanta. Other officers searched the cellar of the defendant's previous residence, and found a spent bullet (*A*), which had been fired from the murder weapon. The New York police informed the FBI that an arrest warrant had been issued for the defendant, and that he was charged with killing an officer. On the basis of this communication, the FBI arrested the defendant in Atlanta. He confessed the shooting to them, and repeated the confession in New York (*C*).

89. **Edward Eckwerth**, convicted (Westchester) Feb. 13, 1957, conviction affirmed 4 N. Y. 2d 811 (1958), cert. denied 357 U. S. 942 (1958), executed May 22, 1959.

Common law murder; bludgeoning of a young woman.

Shortly after the deceased was reported missing, the defendant left his job as a salesman, and went to the West Coast. Brought back from Oregon two months later, he denied his guilt, but made certain admissions (*C*). The police confronted him with a soiled and bloodstained quilt (*A*), which they had taken from the delivery truck that the defendant had driven on his job before the crime. The de-

fendant confessed that he killed the deceased (*C*), and he led the police to her body (*B*). At the trial, witnesses established that the defendant was with the deceased on the afternoon of her disappearance, and that he did not return the delivery truck the next day.

90. 91. **Jackson Turner, Jr.**, and **Ralph Dawkins**, convicted (Queens) Dec. 27, 1957, convictions affirmed 4 N. Y. 2d 967 (1958), cert. denied 359 U. S. 970 (1959), executed July 16, 1959.

Felony murder; shooting in the course of a robbery of a delicatessen. Two co-defendants were sentenced to life imprisonment, pursuant to the jury's recommendation.

Immediately after the shooting, which occurred at about 9:15 at night, the four participants ran away. Officers on motor patrol, unaware of the robbery, saw the two co-defendants running down the street, and stopped them, but released them upon receiving an excuse for their conduct. The two men proceeded. The officers followed a short distance behind in the radio car, arrested them upon receiving a certain radio report, and brought the pair to the scene of the robbery. The co-defendants confessed that they had been the lookouts, and named defendants Dawkins and Turner as their confederates. Dawkins was promptly arrested, confessed to entering the store to rob it, and named Turner as the actual killer (*C*). At the police station, Dawkins was identified by neighbors of the deceased (*D*). A child found in some bushes the gun that was used by defendant Dawkins, and nearby the police recovered the murder weapon, defendant Turner's gun.

An extensive search for Turner proved unsuccessful, because, as witnesses later established, he eluded the police in New York, and fled temporarily to Philadelphia. During the investigation, police officers went to the home of a certain woman, from whom defendant Turner's common-law wife rented a room. On a dresser in the room were five live cartridges (*A*) and one spent shell (*A*), which the officers took away after talking to the woman. The police then went to the home of Turner's mother-in-law, and spoke to Turner's wife there. On the bed in a room that Turner and the girl shared were articles of his clothing (*A*). Later, the police returned to the home of Turner's mother-in-law, and after talking with her, took a suit (*A*) of Turner's; in the inside jacket pocket was a cartridge (*A*). The cartridges and shells obtained by the police were matched to Turner's gun.

Detectives eventually received "information," found Turner, and arrested him. He confessed to the robbery, but blamed Dawkins for the shooting (*C*). At trial, the defendants' friends and acquaintances, including the woman whose house the Turners had occupied, and Turner's common-law wife, testified as to the defendants' admissions, their attempts to hide from the police, and their efforts to dispose of the guns and bullets after the robbery.

92. **Leroy Keith**, convicted (Bronx) Jan. 31, 1958, conviction affirmed 5 N. Y. 2d 1037 (1959), executed July 23, 1959.

Felony murder; shooting of a taxicab driver during robbery.

The defendant shot the cab driver in full view of a police officer, whose help the victim had sought. The defendant then fired at the officer, fled on foot, and was caught after a gun battle. The murder weapon (*A*) was seized from his hand. Three friends of the defendant, who had entered the cab with him and were apparently accomplices, testified against him at trial.

93. **Ivory Mason**, convicted (N. Y.) Apr. 7, 1959, conviction affirmed 7 N. Y. 2d 768 (1959), executed Jan. 14, 1960.

Common law murder; shooting of paramour.

The defendant was arrested in Memphis four years after the crime, and he confessed (*C*). At trial, his guilt was further established by eyewitnesses, and by evidence of flight and motive.

94. **Pablo Vargas**, convicted (N. Y.) Jan 23, 1959, conviction affirmed 7 N. Y. 2d 555 (1960), executed June 12, 1960.

Common law murder; strangling of a sixteen-year-old girl during a rape.

The defendant was a lodger in a boarding house operated by the deceased's mother. He, the other boarders, and neighbors were questioned at the police station, while officers searched the house. In the defendant's room the police found a bathrobe (*A*), a slipper (*A*) and a bedspread (*A*) bearing bloodstains, and the officers saw blood on the floor (*B*). The defendant confessed when confronted with this evidence, and with his fabrications (*C*). It was further proved that he and the deceased were the only residents of the house who were present at the time of the crime, and that the defendant had rearranged certain items in the premises before and after the crime to direct suspicions elsewhere.

95. 96. **Henry Flakes** and **Walter T. Green**, convicted (Erie) March 6, 1959, convictions affirmed 7 N. Y. 2d 1038 (1960), executed May 19, 1960.

Felony murder; shooting during a robbery of a clothing store. A co-defendant was sentenced to life imprisonment, pursuant to the jury's recommendation.

Two days after the murder, defendant Flakes was arrested at his home. He falsely denied being in the neighborhood of the robbery for several weeks. The following day, Flakes's brother delivered to the authorities a bag

(*A*) containing the murder gun (*A*), which defendant Flakes had given him shortly after the robbery. Flakes identified the gun as the weapon he had used in the robbery, and named defendant Green as one of his accomplices (*C*). The same day, Green surrendered, having seen his photograph in a newspaper story about the robbery. Green made substantial admissions (*C*). At the police station, the deceased's widow, who witnessed the murder, identified the defendants as participants (*D*). Sometime thereafter, the police recovered from a cleaning store four suits (*A*) that were stolen from the deceased's shop; the owner of the cleaning store, a friend of defendant Flakes, explained that on the day after the robbery, Flakes had left the garments with him to hold. At trial, the co-defendant's girl friend, who was present in the getaway car during the robbery, testified against the participants. Relatives of the defendants described their admissions, their possession of the stolen clothing, and other incriminating conduct immediately after the crime.

97. **Willard Phillips**, convicted (Nassau) Oct. 17, 1958, conviction affirmed 6 N. Y. 2d 788 (1959), writ dismissed 362 U. S. 456 (1960), executed June 23, 1960.

Felony murder; rape-slaying of an eight-year-old girl.

The girl was reported missing, and was last seen by her schoolmates in the afternoon, driving away with a man. The next day, after talking with the girl's schoolmates, police went to the defendant's home, questioned him there, took some clothing (*A*) that corresponded to descriptions of the clothing worn by the man in question, and brought the defendant to the police station. The girl's body was

found the following day. At some time, the police took some bloodstained underwear (*A*) from the defendant's home. When informed of this evidence, he gave incriminating statements (*C*) for the first time. An examination of the defendant's automobile disclosed peanut shells and hulls (*A*) similar to shells and hulls found in the hair of the deceased, and human hair (*A*) of the same characteristics as the victim's hair.

98. **Ronald Chapman**, convicted (N. Y.) Nov. 30, 1959, conviction affirmed 8 N. Y. 2d 809 (1960), executed Dec. 7, 1960.

Felony murder; killing of an old man by beating, kicking and stabbing, during a robbery in a hallway.

Three women on the street saw the defendant leaving a hallway, keys dangling on a chain from his pocket. After he said something to them and walked on, they pointed him out to a policeman, who arrested him on the street. The defendant forcibly resisted, but was apprehended and was taken to the police station, where $1.40 was found on his person (*B*). At the scene of the arrest, the police recovered the keys (*A*), which belonged to the deceased, and apparently had fallen from the defendant's pocket during the arrest. The defendant confessed the crime, and acknowledged that he had stolen $.50 from the victim (*C*). The defendant's fingerprints (*A*) were found in the hallway.

99. **Ralph Downs**, convicted (Bronx) Nov. 23, 1959, conviction affirmed 8 N. Y. 2d 860 (1960), cert. denied 364 U. S. 867 (1960), executed Jan. 5, 1961.

Felony murder; stabbing of a doctor in his office during a robbery.

After a conversation with the doctor's secretary, who was present at the time of the killing, the police went to the defendant's home, but he was not there. Two months later, the FBI arrested the defendant in Tampa. He confessed the murder to FBI agents, and repeated the confession to New York police officers (*C*). Later, the deceased's secretary identified the defendant in a New York police station (*D*). At trial, witnesses who were in the waiting room during the crime testified against the defendant.

100. **Woodrow Miller**, convicted (Kings) June 7, 1960, conviction affirmed 9 N. Y. 2d 839 (1961), executed June 8, 1961.

Felony murder; shooting during an attempted robbery of a liquor store.

Two men were seen fleeing from the store in a 1955 Oldsmobile convertible. The following morning, a policeman found the defendant and a companion, not his accomplice, seated in a 1955 Oldsmobile convertible, and took them into custody. The car was photographed (*B*). The defendant admitted his participation in the crime, and led the police to the companion's home, where the police found the murder weapon, a sawed-off twelve-gauge shotgun (*A*); and a live twelve-gauge shotgun shell (*A*), similar to the

fatal bullet. The defendant admitted purchasing the gun and ammunition at a certain pawnshop under the name "Robert Wilson" (*C*); this admission was corroborated at trial by the pawnbroker. An eyewitness identified the defendant as one of the two persons seen driving away from the scene, and identified the car from the photograph.

Respectfully submitted,

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On Behalf of the National District
Attorneys' Association
Amicus Curiae
In Support of Respondents
Victor G. Walker and
Edward M. Fay

Dated: April 2, 1965

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

No. 95

VICTOR LINKLETTER, *Petitioner,*

VS.

VICTOR G. WALKER, WARDEN, *et al.*, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AS ADDITIONAL AUTHORITY AN APPENDIX TO PETITIONER'S BRIEF PRINTED IN SUBSTANTIAL CONFORMITY WITH THE REQUIREMENTS OF RULE 39 (1).

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Comes now your Petitioner, Victor Linkletter, through his attorneys of record and shows unto this Honorable Court as follows:

1. During the oral argument in this case, Petitioner's attorney referred the Court to an article then in galley form to be printed in the **Virginia Law Review** by Thomas S. Currier entitled "Time and Change in Judge-made law: Prospective Overruling." Petitioner's attorney is of the opinion that said article is relevant and material authority for consideration by this Honorable Court of the questions presented in this petition for certiorari.

2. The citation for this authority is: Currier, "Time and Change in Judge-made Law, Prospective Overruling",

51 Va. Law Rev. 201, but said Law Review Issue will not be distributed for several weeks.

3. Said Article is presently in re-print form and is printed in substantial, though not exact, conformity with Rule 39 (1), a copy of which is attached to this Motion.

4. Petitioner is a pauper and is without funds to pay the costs of printing said appendix in exact conformity with Rule 39 (1).

WHEREFORE, Petitioner respectfully moves this Honorable Court for leave to file this Motion together with the attached appendix as additional authority in the nature of an appendix to Petitioner's brief.

Respectfully Requested,

Truman Hobbs

Euel A. Screws, Jr.

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Motion together with the attachment hereto on the Hon. Jack P. F. Gremillion, Attorney General of the State of Louisiana, Attorney for Respondent, and on Hon. Michael Juviler, Assistant District Attorney, New York County, 155 Leonard Street, New York, New York, attorney for the **Amicus Curiae**, The National District Attorney Association by mailing a copy to them at the above addresses, First Class Air Mail, postage prepaid, on this 23 day of April, 1965.

Euel A. Screws, Jr.

Attorney for Petitioner

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ARTICLES

TIME AND CHANGE IN JUDGE-MADE LAW: PROSPECTIVE OVERRULING

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After a brief consideration of the nature and history of prospective overruling—that is, the limiting of a new precedent to affect only situations which arise after the new decision is made—the author considers the propriety of its use in federal courts, proposes criteria for determining whether new precedents should be applied retroactively in a broad range of situations, and concludes with a detailed consideration of new precedents expanding fourteenth amendment protection in criminal proceedings. The author stresses that, even in a society reconciled to profound and continuous change, there are thoroughly modern values, both practical and psychological, that frequently require that judicial change, at least, be "absolute" in the sense that it be allowed to reach past as well as future events.

"Time makes ancient good uncouth"

James Russell Lowell, *The Present Crisis*

THIS Article is ultimately concerned with the following bit of melodrama.

See in your mind's eye two men, cellmates. It is the late afternoon of yet another unamusing day in prison, and both men are suitably downcast. Each faces a possible seven years of servitude. Enter the first prisoner's lawyer. "Good news, Arnold, my boy! Your conviction has been reversed, because of that illegally seized evidence the state used at your trial."

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The other prisoner, who has become something of a law buff during the pendency of his appeals, breaks in: "You mean they decided to give *Mapp v. Ohio*[1] retroactive effect?"

The lawyer says a little nervously, "No, Aaron, but Arnold's trial was held after yours, and his appeal had not become final by the time *Mapp* was decided. With that exception,[2] the Supreme Court has just decided to make *Mapp* prospective only. It's terrible luck for you—I can't tell you how sorry I am."

Aaron, who has not been studying the law long enough for the intricacy and importance of balancing and line-drawing to have been borne in upon him fully, makes a series of rude remarks. Then: "We were alleged to have been in on the same robbery. We were together when the evidence was seized. We both protested the seizure, and that we were innocent. What's the deal?"

The lawyer explains that the deal is that Aaron's separate trial happened to be held before Arnold's, and his appeal was heard sooner. He had not petitioned for certiorari to the Supreme Court, so his conviction became final. Arnold is to go free, he explains, because as a matter of simple luck his conviction had not become final as of the date of the *Mapp* decision. Arnold and his lawyer walk off, leaving Aaron rattling his cup against the bars and expressing his views about the majesty of a system of law that takes two people in literally identical circumstances, puts one of them in jail for seven years, and lets the other go free.

Perhaps I have posed the situation in too light a vein. To take a little of the fun out of it, suppose that the men have been convicted of a capital crime. One goes free, the other goes to the gas chamber. His only consolation as the green door is dogged tight is to mull over his final chat with his lawyer a few minutes before, a chat that might have gone something like this:

"As your friend and as an officer of the court, Aaron, I would like at this serious time to ask you to consider a few nice points. First, you mustn't feel so badly about this disparity of treatment, because the new rule which set your cellmate free was not made with a view to defendants at all. Rather, it was designed to deter the police from making illegal seizures. Since the rule was not made with your interests

1. 367 U.S. 643 (1961).

2. See, *e.g.*, Ker v. California, 374 U.S. 23 (1963), which applied the *Mapp* rule on appeal, but, finding that it had been complied with, affirmed the conviction. The *Mapp* case itself applied the new rule on appeal in reversing Miss Mapp's conviction.

in mind, it is proper to decide how to apply it—where to draw the line—without considering this disparity of treatment, distasteful as it is to all of us. As to your blunt suggestion, 'That ain't how American courts are supposed to work,' you are quite wrong. The result was based on traditional and careful balancing of the *relevant* interests; in the end, convenience of judicial and criminal administration won the day.

"I wish I could impress upon you that it was purely incidental that you lost, since the new rule never really involved you at all. It is quite true that your cellmate went free because he had a 'constitutional right' which had not been in existence at the time of your conviction. But that terminology is misleading. He was given a personal, constitutional right solely because that was the only way we could get the police to stop illegal seizures. Illegal evidence has just as great probative value as any other. Thus you are just as likely to have been properly found guilty on the basis of *that* evidence as any other. You see, there are other things about illegal seizures that we don't like—invasion of privacy, intimidation, and the like—and we just hit at the thing as best we could.

"Now they're going to be coming for you in a minute, but I do want to be sure you understand this last part before you go. You say to me, 'That's a lot of hogwash. If it's a constitutional right for him, it's a constitutional right for me. I am getting abused,' or words to that effect. May I say that that's a surprisingly sophisticated approach for one of your modest education to take. In former times some very able men have said just that, but now we know that in fact the Constitution is not always the same. Judges change it; they reinterpret it to better fit the times. In a sense, you see, they are like legislators. Now this is my point. Since they are in effect performing a quasi-legislative task, it is proper for them to say, as Congress almost always does, that the new rule shall only apply to future transactions. Thus people who rely on the old rules are not disappointed, stability is fostered, and so on.

"You tell me, 'The Constitution says what's right, and that's the same for me as for the next guy.' Now that's interesting, you know; quite an insight in a way. But what you fail to see is that what is 'right' gradually changes also, and—to the extent that the Constitution embodies our fundamental notions of what is right—the Constitution changes too. What may shock the conscience of the country today may have been entirely acceptable in 1930. Thus a man may have been *fairly* convicted in 1930 and be in jail today, even though the trial wouldn't stand up to modern standards. But you can see that he can hardly say his trial wasn't fair, for we just said it *was*. It's just that the effectua-

tion of the change seems a bit sudden when the Court engages in prospective overruling. You'll remember we talked about that.

"Prospective overruling is a simple matter of facing up to the reality that things *change*, even fundamental things, and effecting change in a deliberate and rational manner rather than pretending that things were always the way they are now. Admittedly, change *can* seem abrupt when courts do this, but you mustn't think of yourself as a victim of the practice. You're not a victim; it's just that your cellmate Arnold—fortuitously, I admit—is a *beneficiary*. If I could give you just one piece of advice to take with you, I would urge you not to attempt to universalize your sense of right and wrong.

"Well, Aaron, here are your friends, and I must be running along. May I say how very sorry I am that things had to work out this way. Better luck in a better world."

Something very much like this bit of gallows humor could have taken place had the Fourth Circuit[3] been persuaded that *Mapp* should be given only prospective effect, as many have urged.[4] It may still happen if other circuits[5] pursue the line they have already taken, or if the Supreme Court follows their lead. It is the purpose of this Article to consider prospective overruling generally, to urge that it is an entirely proper device in a great many circumstances, but to demonstrate that it is not appropriate in cases like *Mapp* where constitutional rights and criminal sanctions are involved. In other areas stability and the right to rely on existing law may well be controlling but, in the area of individual liberties, like treatment of persons in like circumstances is the overwhelming consideration.

This is so primarily because the great mass of people—and not just simple folk like Aaron—*do* "universalize" their notions of right and wrong. They *are* capable of being outraged at old wrongs—the burning of witches, say, the beating of slaves—and will not be put off with the

3. See Hall v. Warden, 313 F.2d 483 (4th Cir.), *cert. denied*, 374 U.S. 809 (1963).

4. For the most compelling arguments see Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650 (1962); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 909-12 (1962). Both are discussed at some length in Part IV of this Article.

5. United States *ex rel.* Angelet v. Fay, 333 F.2d 12 (2d Cir.), *cert. granted*, 379 U.S. 815 (1964) (No. 578); Sisk v. Lane, 331 F.2d 235 (7th Cir. 1964); United States *ex rel.* Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963), *cert. granted*, 377 U.S. 930 (1964) (No. 1125, 1963 Term; renumbered No. 95, 1964 Term); Gaitan v. United States, 317 F.2d 494 (10th Cir. 1963).

explanation that the wrongdoers were upright men affording the due process of their day and meaning only to serve the highest good. It is a flaw of moral perception, perhaps, to apply our morality retroactively, but it is a powerful phenomenon and can lead to a dangerous contempt for a system of that does not take it into account.

Happily, there are strong indications that the Supreme Court shares this flawed moral perception. Consider the case of *Fay v. Noia*,[6] in which the Supreme Court extended the right to be heard on habeas corpus so long as presently available state remedies were exhausted, regardless of what remedies, now lost, had been foregone in the past. Two of three men convicted of felony-murder had been released through habeas corpus proceedings. The third, Noia, was held to be ineligible since he had not appealed his state conviction. In reversing this holding, the Supreme Court concluded:

> Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison. Noia, no less than his codefendants Caminito and Bonino, is conceded to have been the victim of unconstitutional state action. Noia's case stands on its own; but surely no just and humane legal system can tolerate a result whereby a Caminito and a Bonino are at liberty because their confessions were found to have been coerced yet a Noia, whose confession was also coerced, remains in jail for life. For such anomalies, such affronts to the conscience of a civilized society, habeas corpus is predestined by its historical role in the struggle for personal liberty to be the ultimate remedy.[7]

The question of the effect to be given to the *Mapp* precedent is particularly difficult and urgent. Having indicated my conclusions on this specific problem, I propose to consider the prospective limitation technique in general, to suggest an approach for, and the relevant values to be considered in, all overruling situations, and, finally, to apply the approach and the values in habeas corpus cases and particularly in the *Mapp* case.

I. Background and Techniques of Prospective Overruling

It is the common-law tradition that judicial precedents normally have retroactive as well as prospective effect.[8] That is, what a court

6. 372 U.S. 391 (1963).

7. *Id.* at 441.

8. Oliver Wendell Holmes, Jr., author of the *The Common Law*, was speaking as Mr. Justice Holmes of the United States Supreme Court when in 1910 he wrote, "I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective

holds to be the law today for the litigants before it, is the law for persons who come into the court hereafter, even though the alleged wrong was committed before today's decision, and today's decision declares illegal what appeared to be legal when it was done. Legislation, on the other hand, generally has only prospective effect. That is, it applies only to transactions that occur after the final passage of the statute. The classical explanation for retroactive operation of judicial precedent, articulated by Blackstone, was that the law exists independent of judicial decisions. It is, in Holmes' familiar phrase, a "brooding omnipresence," absolute and unchanging. The judge's function is not to make the law but to find it, not to "pronounce a new law, but to maintain and expound the old one"; and an overruling decision signifies not that the decision overruled "was *bad law*, but that it was *not* law; that is, that it is not the established custom of the realm, as had been erroneously determined." [9]

The approach seems a bit willful to the modern mind, but made perfect sense in a time that saw the world as shot through with certainty, illuminated with Reason, Divine Design, or the ordering hand of a Clockmaker God. Predictably, in an age that is at home with the melting clocks of Salvador Dali and the besetting flux of Henry Adams, the Blackstonian view of judicial decision-making has been generally disavowed.[10] Even so, some decisions continue expressly to reflect his thesis,[11] and, for whatever reason, the great majority of overruling

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operation for near a thousand years." [Dissenting in Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910).] There is a certain grandeur in the sweep of Holmes' phrasing, but the statement remains a fair description of one of the central principles in our received learning on the common law.

Note, 71 YALE L.J. 907 (1962). (Footnote omitted.)

Because retroactive operation of decisions is inherent in the common-law system, the hardship which it sometimes produces is ordinarily accepted as a necessary evil.

Note, *The Effect of Overruled and Overruling Decisions on Intervening Transactions*, 47 HARV. L. REV. 1403 (1934).

9. 1 BLACKSTONE, COMMENTARIES *69-70. For further exposition of the theory, see Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 907-08 (1962), and authorities there cited.

10. See, e.g., Covington, *The American Doctrine of Stare Decisis*, 24 TEXAS L. REV. 190, 200-04 (1946); Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 4 (1960); Snyder, *Retrospective Operation of Overruling Decisions*, 35 ILL. L. REV. 121, 122 (1940); Spruill, *The Effect of an Overruling Decision*, 18 N.C.L. REV. 199 (1940).

11. E.g., Hall v. Warden, 313 F.2d 483, 495 (4th Cir.), *cert. denied*, 374 U.S. 809 (1963):

It must be recognized that, since Weeks and Wolf, there had been no change in the constitutional requirements of due process considered and found con-

decisions are given retroactive effect, usually without comment on the possibility of taking another approach. A majority of the United States Supreme Court, for instance, has yet to limit an overruling decision expressly to prospective effect.

Early attachment to the retroactive-declaratory theory reveals itself in holdings that an overruling decision, although retroactive in operation, does not violate the ex post facto[12] or the contract[13] clause of the Constitution. The declaratory approach was also reflected, indirectly, in early cases giving retroactive effect to decisions invalidating or reinterpreting statutes.[14] Similarly, the declaratory theory is reflected in the doctrine of *Swift v. Tyson*.[15] Since state courts were merely finding

trolling in Mapp. If the protections are there now, were they not present when Wolf was decided and were they not present when Hall was tried, convicted and sentenced? An affirmative answer would appear to be inescapable.

12. Frank v. Mangum, 237 U.S. 309, 343-44 (1915); *cf.* Ross v. Oregon, 227 U.S. 150 (1913) (decision in case of first impression).

In *Mangum* objection was raised, in habeas corpus proceedings, to a ruling by the Supreme Court of Georgia that grounds were available at the time of a trial for objecting to the defendant's absence at the reception of the verdict. Defendant alleged that this ruling was based on a decision, made after the event, which was inconsistent with existing decisional law. 237 U.S. at 325, 343-44. Without going into the cases or considering the question of reliance, the United States Supreme Court simply held:

> Assuming the inconsistency [between the controlling case at the time of sentencing and the later case relied upon by the Georgia court in ruling that the objection was available and thus waived], it is sufficient to say that the . . . [ex post facto clause], as its terms indicate, is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts.

237 U.S. at 343-44. The Court did not consider whether the action of the Georgia court violated the due process clause.

13. Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924). *But see* Douglass v. County of Pike, 101 U.S. 677 (1879). Holding that a decision overruling a judicially settled interpretation of a statute, under which contractual rights had been established, could not be applied to the case at bar, the Court stated: "[W]e cannot give [the overruling decision] . . . retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing." *Id.* at 687.

14. Thus in Norton v. Shelby County, 118 U.S. 425 (1886), suit had been brought on bonds issued by a board of commissioners created by a Tennessee statute. After issuance of the bonds, but before suit, the statute was construed for the first time by the state supreme court, in other litigation, and held to violate the state constitution. Thus in the *Norton* case there was no question of reliance on a prior decision. The Supreme Court of the United States rejected the position that the bonds were valid as acts of *de facto* officers of the county. To the contention "that a legislative act, though unconstitutional, may in terms create an office" for the purpose of the *de facto* doctrine, Mr. Justice Field responded that "it is difficult to meet it by any argument beyond this statement. An unconstitutional act is not a law; . . . it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Id.* at 442.

15. 41 U.S. (16 Pet.) 1 (1842).

the common law rather than making it, federal courts regarded themselves as free to find the common law of a state independently of the state courts. In the words of Mr. Chief Justice Story, decisions

> are, at most, only evidence of what the laws are, and not of themselves laws. . . . [T]he state tribunals are called upon to perform like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.[16]

Mr. Justice Holmes attacked *Swift v. Tyson*, and the declaratory theory, in his famous dissent in the *Black & White Taxicab* case:

> It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. . . . The common law so far as it is enforced in a State . . . is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.[17]

In an earlier opinion,[18] Mr. Justice Holmes had recognized that the logic of *Swift v. Tyson* was in basic conflict with the practice of limiting judicial decisions to prospective effect.

For all that the traditional declaratory approach may have had deep roots in fundamental notions of the nature of law, there were a few cases, even in the years when the declaratory view held full sway,

16. *Id.* at 18-19.

17. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533-34 (1928).

18. Dissenting in Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910), Mr. Justice Holmes said of state law cases in which the Court had refused to apply state court decisions retroactively:

> In those cases the court . . . [recognized] the fact that decisions of state courts of last resort make law for the State. The principle is that a change of judicial decision after a contract has been made on the faith of an earlier one the other way is a change of the law. . . . [These cases stand] on the ground that the state decision made the law for the State, and therefore should be given only prospective operation when contracts had been entered into under the law as earlier declared.

Id. at 371.

where the abstract notion compelled too harsh a result. Classical theory was put aside in these cases, and substantial justice done by giving the overruling decision prospective effect only. Notable among them is *Gelpcke v. City of Dubuque*,[19] a diversity case in which the Supreme Court of the United States refused to give retroactive effect to an overruling decision of the Supreme Court of Iowa that had held certain municipal bonds invalid. The earlier Iowa decision was applied because the plaintiffs in the federal action had purchased their bonds in reliance upon it. The Court stressed the reliance of the bondholders; the opinion spoke of "the plainest principles of justice," and made no mention of the dogma that judicial decisions are necessarily retroactive. "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past." [20]

19. 68 U.S. (1 Wall.) 175 (1863), discussed in Read, *The Rule in Gelpcke v. Dubuque*, 9 AM. L. REV. 381 (1875); Thayer, *The Case of Gelpcke v. Dubuque*, 4 HARV. L. REV. 311 (1891).

20. 68 U.S. (1 Wall.) at 206. While the substantive law question in *Gelpcke* was the constitutional authority of the City of Dubuque to issue the bonds in question, the more famous aspect of the decision is, of course, its aggravation of the problem of variance between result of litigation in state and federal courts under *Swift v. Tyson*: "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice." *Id.* at 206-07.

The result in *Gelpcke*, and other municipal bond cases in the federal courts that followed, can be attributed partially to the influence of *Swift v. Tyson*, and to that extent *Gelpcke*'s significance as an inroad on the Blackstonian theory of retroactivity is diminished. Even prior to the *Erie v. Tompkins* era, federal courts were reluctant to depart from state court decisions as to whether a state statute violated the state constitution. Nonetheless, the Court in *Gelpcke* regarded itself as free to evaluate the Iowa statute independently: "It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority." *Id.* at 205-06. But the dissent in the *Gelpcke* case was cast in Blackstonian terms: "I understand the doctrine to be in such [overruling] cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law, and in fact, that the same statute or constitution means one thing in 1853, and another thing in 1859." *Id.* at 211.

For a discussion of the relation of *Swift v. Tyson* to these early Supreme Court cases on the problem of retroactivity, see Kuhn v. Fairmont Coal Co., 215 U.S. 349, 361 (1910).

In a later municipal bond case coming through the federal courts, the Supreme Court stated: "The question presented . . . is not so much whether these late [overruling] decisions are right, as whether they should be followed in cases having reference to bonds put out and in the hands of innocent purchasers when they were announced." Douglass v. County of Pike, 101 U.S. 677, 679 (1879). For a discussion of the municipal bond cases see Note, 71 YALE L.J. 907, 917-20 (1962).

Although there were other early cases in which the courts in fact refused to give retroactive effect to their decisions,[21] prospective overruling was not expressly advocated as a distinct and proper method of deciding cases until well into this century.[22] Once the theory was articulated, however, it received wide and generally enthusiastic attention.[23]

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21. *E.g.*, Jones v. Woodstock Iron Co., 95 Ala. 551, 10 So. 635 (1892); Bingham v. Miller, 17 Ohio 445, 448-49 (1848); see Note, 71 YALE L.J. 907, 916-20 (1962). See also Levy, *supra* note 10, at 8-9.

Bingham was an early example of the technique of prospective limitation, not recognized contemporaneously as such. For a discussion see Note, 71 YALE L.J. 907, 916-17 (1962). The Ohio court decided that the legislature had no power to grant legislative divorces, but simultaneously refused to hold invalid the legislative divorce that was in issue because of the impact this would have on the status of progeny of second marriages already contracted.

In Douglass v. County of Pike, 101 U.S. 677, 687 (1879), for instance, the Court used language that would free overruling decisions involving statutory interpretation from the declaratory-retroactive stricture of Blackstone's view: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative amendment." While Blackstone was speaking of the common law—"the custom of the realm," BLACKSTONE, *op. cit. supra* note 9—the logic of his position is equally applicable to statutory construction. If, in interpreting a statute, courts only declare its meaning, then a new decision declaring a different meaning should, upon Blackstone's theory, indicate that the overruled interpretation was erroneous and never the law. In fact, Mr. Justice Black's dissent in James v. United States, 366 U.S. 213 (1961), discussed in Part II *infra*, applies Blackstone's view to statutory interpretation and regards it as a salutary limitation upon judicial legislation.

22. The origin and development of the idea are traced in detail in Levy, *supra* note 10, at 7-25. For early expositions of the idea see Wigmore, *Editorial Preface* to SCIENCE OF LEGAL METHOD at xxxvii-viii (Modern Legal Philosophy Series No. 9, 1917); Address by George F. Canfield, Annual Meeting of the South Carolina Bar Association, Aug. 4, 1917, in 24 S.C.B.A. REP. 17-21 (1917); Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision*, 18 COLUM. L. REV. 230, 251 (1918); WIGMORE, PROBLEMS OF LAW: ITS PAST, PRESENT, AND FUTURE 79-82 (1920); CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 147-49 (1921); Kocourek, *Retrospective Decisions and Stare Decisis and a Proposal*, 17 A.B.A.J. 180, 182 (1931); Address by Chief Judge Cardozo, New York State Bar Association, Jan. 22, 1932, in 55 N.Y.S.B.A. REP. 263, 294-96 (1932); Kocourek & Koven, *Renovation of The Common Law Through Stare Decisis*, 29 ILL. L. REV. 971, 995-96 (1935); LEVY, CARDOZO AND FRONTIERS OF LEGAL THINKING 109-11 (1938).

For early opposition to the idea of prospectively limiting overruling decisions, see Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 426-27 (1924); Note, *The Effect of Overruled and Overruling Decisions on Intervening Transactions* 47 HARV. L. REV. 1403 (1934).

23. See note 22 *supra*. See generally LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 299-305 (1960).

Mr. Justice Cardozo gave prospective limitation a considerable boost in 1932, in *Great Northern Railway v. Sunburst Oil & Refining Co.*[24] The Supreme Court of Montana had previously held, in *Doney v. Northern Pacific Railway*,[25] that upon reduction of intrastate freight rates by the State Railroad Commission, shippers who had paid the old rate, pursuant to the railroad's published tariff approved by the Commission, were given by the applicable statute the right to recover the excess payments. In *Sunburst*, the Montana court overruled the *Doney* decision and announced that the statute did not create such a right. Utilizing the prospective limitation approach, however, the court held that the *Doney* rule should nonetheless be applied to the *Sunburst* case and to other contracts of carriage entered into in reliance upon the *Doney* decision.[26] Thus Sunburst was permitted recovery under the old rule. The Supreme Court of the United States held that the railroad had not been deprived of property without due process of law by the Montana court in this situation. In solving the problem of retroactive operation of judicial decisions, "the choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature."[27] Thus as far as state courts are concerned the United States Constitution neither precludes nor compels prospective limitation.

While it has been objected that, after a flurry of interest in the 1930's, the courts have been unreasonably timid about prospective limitation,[28] the technique has been adopted in many cases in state courts.[29] Prospective limitation has been utilized less frequently in the federal courts, in part because the Supreme Court has not directly passed on its validity under the federal constitution. But federal courts have used the technique in a number of cases, and upon analysis, doubts of its availability in federal courts appear to be ill-founded.[30]

Proponents of prospective limitation urge that an appellate court performs two distinct functions in deciding a case before it: disposing of that case and shaping the decisional law. They argue that since the factors that should control these two functions may be fundamentally

24. 287 U.S. 358 (1932), *affirming* 91 Mont. 216, 7 P.2d 927 (1932). Compare Montana Horse Prods. Co. v. Great No. Ry., 91 Mont. 194, 7 P.2d 919 (1932).

25. 60 Mont. 209, 199 Pac. 432 (1921).

26. 91 Mont. at 220-21, 7 P.2d at 929.

27. 287 U.S. at 365.

28. Levy, *supra* note 10, at 2-3.

29. See notes 34-41 *infra* and accompanying text, Part III *infra*.

30. The problem is discussed in Part II *infra*.

different, it is sensible for the court to consider them separately.[31] When precedent is under attack, an appellate court should give attention first to the rule under attack, and whether it ought to be overruled. If it decides to overrule, it should then decide whether or not the new rule should be applied in the disposition of the case at bar.

The basic premise of this theory is that courts obviously do make law in the process of deciding cases. "Judges may be conservative, modest, and self-effacing," as one commentator has put it, "but the substantive law never got secreted from the interstices of procedure (in Maitland's happy phrase) without their aid."[32] Advocates of prospective overruling urge that, since the courts do in fact perform this distinct and broader function, they should do it more deliberately. They conclude that courts should feel free to weigh the precedential or "legislative" effect of their decisions unburdened by any concern that changing the established rule—albeit for the better—will necessarily impose hardship or injustice on the litigants in the case at bar, or on others who have acted in reliance upon the precedent to be rejected. Thus hard cases need not make, nor perpetuate, bad law. The desired result is that courts will then revise decisional law more readily, more effectively, and more fairly, when faced with an outmoded or unsound precedent upon which broad reliance has been placed.[33]

Courts that have accepted these basic propositions have reached varying results in performing the second function described above—in deciding whether a particular overruling decision should be given retroactive or only prospective effect. The various techniques of prospective limitation, and some consequences of their use, can be studied in a series of cases dealing with sovereign immunity. The doctrine of sovereign immunity from tort liability has been subjected to vigorous and sustained

31. See Levy, *supra* note 10, at 13, quoting passages from Address by Chief Judge Cardozo, New York State Bar Association, January 22, 1932, in 55 N.Y.S.B.A. Rep. 263, 296-97 (1932):

> What the court is saying, as Cardozo phrased it, is this: "The rule that we are asked to apply is out of tune with the life about us. It has been made discordant by the forces that generate a living law. We apply it to this case because the repeal might work hardship to those who have trusted to its existence. We give notice, however, that any one trusting to it hereafter will do so at his peril."
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> If this course were pursued, the fruits would be incalculably rewarding: "Much of the evasion, the pretense, the shallow and disingenuous distinctions too often manifest in opinions—distinctions made in the laudable endeavor to attain a just result while preserving a semblance of consistency—would disappear from our law forever. . . ."

32. Levy, *supra* note 10, at 3.

33. See Kocourek & Koven, *supra* note 22, at 990-99.

attack in the courts in recent years, and with a fair degree of success. To a number of courts, these cases seemed clearly to call for prospective limitation, most often because of what the courts spoke of as an unusual interest in protecting "reliance." Normally, of course, it cannot be said that a tortfeasor has relied upon the substantive law in negligently injuring another. But a question of reliance is raised by a decision overruling immunity from liability. As stated by the Supreme Court of Illinois in *Molitor v. Kaneland Community Unit District No. 302*:

> We do not suggest that the tort itself was committed in reliance on the substantive law of torts, *i.e.*, the bus driver did not drive negligently in reliance on the doctrine of governmental immunity, but rather that school districts and other municipal corporations have relied upon immunity and that they will suffer undue hardship if abolition of the immunity doctrine is applied retroactively. In reliance on the immunity doctrine, school districts have failed to adequately insure themselves against liability. In reliance on the immunity doctrine, they have probably failed to investigate past accidents which they would have investigated had they known they might later be held responsible therefor.[34]

Courts have reached various conclusions as to whether reliance of this type is an adequate cause, when overruling an immunity from tort liability, to limit the overruling decision to prospective effect. The Supreme Court of California felt reliance was unjustified in light of recent statutes and judicial decisions restricting the immunity doctrine, and overruled the doctrine retroactively.[35] The California legislature, apparently disagreeing, promptly enacted a moratorium barring tort actions against governmental entities that would have been barred prior to the overruling decision.[36] Its purpose was to afford time for a comprehensive study of the problem; and this resulted in recommendations for legislative reform[37] that were enacted by the legislature in 1963.[38]

34. 18 Ill. 2d 11, 28-29, 163 N.E.2d 89, 97-98 (1959).

35. Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 221, 359 P.2d 457, 463, 11 Cal. Rptr. 89, 95 (1961):

> Only the vestigial remains of such governmental immunity have survived; its requiem has long been foreshadowed. For years the process of erosion of governmental immunity has gone on unabated. . . . Thus . . . we make no startling break with the past but merely take the final step that carries to its conclusion an established legislative and judicial trend.

36. Cal. Stat. 1961, ch. 1404.

37. 4 California Law Revision Commission, Reports, Recommendations and Studies 801-1611 (1963); see Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 Stan. L. Rev. 163 (1963).

38. Cal. Gov't Code §§ 810-996.6. Moreover, this addition to the Code was made fully retroactive. Cal. Stat. 1963, ch. 1681, § 45, at 3228.

The Supreme Court of Illinois in the *Molitor* case, on the other hand, postponed the general effective date of its newly announced rule of municipal tort liability to causes of action arising after the date of decision to enable uninsured municipalities to obtain liability insurance.[39] And the Supreme Court of Minnesota postponed its overruling in order to give the legislature a last chance to handle the job, conceding "that the flexibility of the legislative process—which is denied the judiciary—makes the latter avenue of approach more desirable." [40] But the prod to legislative action was unmistakeable; the court was "unanimous in expressing its intention to overrule the doctrine of sovereign tort immunity," if necessary, as to school districts, municipal corporations, and other subdivisions of government, "after the next Minnesota Legislature adjourns." [41]

One final variation that requires discussion is the "reward" approach employed by the Illinois Court in *Molitor*. While holding that its decision was in general to have only prospective effect because of justifiable reliance upon its prior decision by failure to insure and failure to investigate claims, the court nonetheless decided to apply the new rule to the case before it, not because of lack of reliance in the particular case, but on grounds which, if valid, appear applicable to all instances of prospective overruling:

> At least two compelling reasons exist for applying the new rule to the instant case while otherwise limiting its application to cases arising in the future. First, if we were to merely announce the new rule without applying it here, such announcement would amount to mere

39. Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

A similar result has been reached in cases overruling the doctrine of charitable immunity. *E.g.*, Parker v. Port Huron Hosp., 361 Mich. 1, 105 N.W.2d 1 (1960).

> In the interests of justice and fairness, in view of the new ruling and the reliance that some, albeit few, charitable, nonprofit hospital corporations may have placed on the old ruling, and may have failed to protect themselves by the purchase of available insurance, we believe the new rule should apply to the instant case and to all future causes of action arising after September 15, 1960, the date of the filing of this opinion.

Id. at 28, 105 N.W.2d at 14-15. See Kojis v. Doctors Hosp., 12 Wis. 2d 367, 107, N.W.2d 292 (1961).

40. Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 292, 118 N.W.2d 795, 803 (1962).

41. *Ibid.*. The Minnesota Supreme Court seems to view this practice as an attractive alternative, for they expressed the same caveat in a more recent decision. See Jeruzal v. Jeruzal, 130 N.W.2d 473 (Minn. 1964).

> *dictum*. Second, and more important, to refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus there would be no incentive to appeal the upholding of precedent since appellant could not in any event benefit from a reversal invalidating it.[42]

Neither the dicta argument, which is considered elsewhere,[43] nor the "reward" argument seems compelling.

The reward argument in support of the *Molitor* practice—awarding recovery to the plaintiff under the new rule, and thereby carving an exception from the prospective limitation otherwise imposed upon it—is that without such an exception incentive to attack unsound precedent would be lacking. This, like the dicta argument, was one of the objections urged against the prospective effect approach when it was first advanced.[44] Perhaps adoption of the reward technique in *Molitor* can be explained, though not justified, as an attempt to avoid these objections. But all incentive to attack a crumbling precedent is not eliminated by the prospective effect approach because, even under it, prospective limitation is not automatically the rule, and the possibility of retroactive overruling is a carrot still available to encourage litigation—assuming that this is desired.[45] Additionally, there are litigants with recurring interests in particular rules of law, who can be relied upon to attack infirm doctrine for the potential rewards that would flow from even a prospectively limited overruling decision.[46]

In any event, application of a mechanical formula that, without reference to other criteria, rewards the winning litigant in an overruling decision otherwise limited to prospective effect is undesirable for another reason. It results in substantial impairment of the value of equality, which, as Part III of this Article attempts to show, is one of the major values to be considered in determining whether precedent should be rejected, and, if so, whether the new rule should be retroactively applied.

In summary, prospective limitation appears to have been utilized clandestinely even by Blackstonian judges when the need for it was sufficiently great. The practice has been expressly advocated for almost

42. 18 Ill. 2d at 28, 163 N.E.2d at 97.

43. Part II *infra*.

44. Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 426 (1924); Note, 47 HARV. L. REV. 1403, 1412 (1934); Note, 28 KY. L.J. 351, 354-55 (1940).

45. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 491 (1962); Note, 60 HARV. L. REV. 437, 440 (1947).

46. *Ibid.*

fifty years; its acceptance as a proper exercise of judicial power has increased during those years; and it is presently in use in a number of state courts, though its propriety in federal adjudication has not yet been authoritatively established. Finally, conscious experience of the practice has been fairly short; no one court, nor the courts as a whole, have had adequate experience with the practice to develop any extensive theories about it. Thus techniques vary widely; and comprehensive criteria for determining when prospective limitation is called for and should be imposed have not yet been worked out.

II. Prospective Limitation in Federal Courts: Justiciability and Separation of Powers

Arguments have been made that the prospective limitation technique is beyond the scope of the federal judicial power authorized by article III of the Constitution, because it results in judicial pronouncements on the law that are not dispositive of the case or controversy before the court; and that use of the technique by federal courts violates the constitutional requirement of separation of powers. Each argument has a certain appeal, but neither seems to survive a close analysis. The two arguments have been separated for the discussion and analysis that follow.

A. Prospective Limitation Under Article III

Critics of the prospective effect approach maintain that, if an overruling decision is prospectively limited, the overruling language is dicta;[47] and, further, that it is an advisory opinion beyond the scope of the federal judicial power enumerated in article III of the Constitution and may not be given by a court established under that article.[48] Similarly it is suggested that if the newly announced rule is applied to the case at bar, then any language indicating that the overruling decision is to have only prospective effect in other cases is also dicta, and constitutes advisory opinion beyond the constitutional power of federal courts.[49]

47. Von Moschzisker, *supra* note 44, at 426; Note, 47 Harv. L. Rev. 1403, 1412 (1934).

48. See Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 930-33 (1962).

49. See authorities cited notes 47 & 48 *supra*. This duality of the dictum objection is observed in Note, 46 Iowa L. Rev. 600, 616 (1961).

The argument confuses appraisal of what an article III court may properly do in exercising the federal judicial power with the weight that may properly be attributed to its decisions as stare decisis.[50] The former is the constitutional restriction imposed by article III that "the jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy.'" [51] There is an ample body of Supreme Court decisions placing cases to one side of the line or the other,[52] but there is no serious suggestion that, in a dispute which would otherwise present a case or controversy, justiciability is destroyed by the contention that precedent should be overruled—or that the overruling should be limited to prospective effect. The argument against federal use of the prospective overruling technique is rather that the constitutional restriction of federal judicial power to determination of cases or controversies prevents a federal court from considering contentions that are not dispositive of an admitted case or controversy properly before it.[53]

It is true that the limitations imposed by article III should and do influence federal courts to restrict their consideration to issues that are potentially dispositive of pending litigation. But there is an important difference between an issue that is potentially dispositive and one that ultimately turns out to be dispositive in fact; and, because of this difference, what a federal court does in disposing of a case or controversy is generally subject only to influence, and not to command, by article III. It frequently is not possible at the outset, or even midway through the course of litigation, to ascertain which issues will in fact be dispositive of the case.

An example may be in order. At conclusion of trial, a court may find all facts as alleged by the plaintiff, but conclude as a matter of law

50. It thus reflects an unfortunate marriage of what Professor Moore has called the fetish of federal jurisdiction, see 1 MOORE, FEDERAL PRACTICE ¶ 0.60[4] (2d ed. 1964), with the somewhat artificial technique developed to deliver the House of Lords from the bondage of its own prior decisions without its actually overruling them. It is one thing for Professor Goodhart to argue that admittedly germane reasoning of the House of Lords, as distinguished from the actual disposition of the case before it, is not binding precedent. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 182 (1930). It is quite another to say that federal courts exceed their constitutional powers by reducing their reasoning to written form.

51. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring).

52. See 6 MOORE, FEDERAL PRACTICE ¶¶ 57.11-.16 (2d ed. 1953).

53. See Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 932-33 (1962).

that the facts alleged and proved entitle him to no relief. It might have been possible for the court to reach this conclusion of law prior to trial of the factual issues, and there are procedural devices available for this purpose.[54] But the defendant need not utilize these devices; and, even if he does, the court may postpone decision of the issue of law, for one reason or another, until the factual issues have been tried and determined.[55] Thus a determination of the plaintiff's factual contentions will be necessary. They are potentially dispositive, and the court may hope to avoid a difficult question of law in the event plaintiff fails to prove his propositions of fact. In the end, the plaintiff having proved his facts, it may turn out that the law is with the defendant, so that these issues of fact are not ultimately dispositive, though they were potentially so. The example is surely homely and familiar enough;[56] no one would urge that the procedure followed is beyond the power of a federal court, or even improper, under article III.

Cases and controversies also frequently involve two or more issues of law or mixed law and fact that are potentially dispositive, even though, in the end, only one may dispose of the case. When this is true, it is a proper exercise of judicial power to determine both issues. In the end, perhaps both adjudications will support the judgment rendered, and hence be dispositive; or possibly one issue will be adjudicated adversely to the winning litigant, but judgment will be rendered in his favor on the basis of a favorable adjudication of the other. Both results are commonplace, and neither is subject to query under article III.

A defendant sued for patent infringement will prevail, for example, if the court concludes either that the patent is invalid or that the defendant is not infringing. But neither issue is rendered moot or nonjusticiable by the presence of the other. If both are resolved in favor of the defendant, both are concluded under the doctrine of collateral estoppel,[57] and the court's holding as to each is stare decisis, under the

54. *E.g.*, Fed. R. Civ. P. 12(b)(6).

55. Failure to state a claim upon which relief can be granted is not waived, for example, by failure to assert it in a motion or the initial responsive pleading; it "may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits." Fed. R. Civ. P. 12(h)(1).

56. Thus a complaint should not be dismissed for legal insufficiency on a motion under rule 12(b)(6), and the legal issue postponed, "*unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" 2 Moore, Federal Practice ¶ 12.08, at 2245 (2d ed. 1962).

57. Irving Nat'l Bank v. Law, 10 F.2d 721, 724 (2d Cir. 1926); First Nat'l Bank v. City of Covington, 129 Fed. 792 (C.C.E.D. Ky. 1903), *aff'd*, 198 U.S. 100 (1905); Patter-

generally prevailing view.[58] If the plaintiff prevails on one of these issues, but judgment goes for the defendant on the other, it is true that the judicial determination adverse to the winning defendant is normally not entitled to collateral estoppel effect, both because it is not a dispositive adjudication and because the defendant generally has no right of appeal; nor is the court's holding on the nondispositive issue part of the ratio decidendi of the case.[59] But the issue cannot be identified as nondispositive until the case is heard, and the court therefore properly determines the issue. A problem of mootness and nonjusticiability does not arise *during* the litigation. Thus if the court concludes that the patent is valid but not infringed, the decision is not authority for the proposition that the patent is valid, either as collateral estoppel or as stare decisis. But the court did not err in considering and adjudicating the issue, and its disposition of the issue obviously has some predictive value.[60]

Only if the issue of validity becomes moot during litigation would its adjudication be improper. In *Cover v. Schwartz*,[61] such a situation faced the Second Circuit. The plaintiff appealed from a judgment for defendant based on a finding that a patent was invalid; in his brief on

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son v. Saunders, 194 Va. 607, 74 S.E.2d 204 (1953), 28 NOTRE DAME LAW. 282, 39 VA. L. REV. 566; Green v. Edwards, 31 R.I. 1, 77 Atl. 188 (1910); Hardware Mut. Ins. Co. v. Valentine, 119 Cal. App. 2d 125, 259 P.2d 70 (4th Dist. 1953); RESTATEMENT, JUDGMENTS § 68, comment *n* (1942).

58. See Massachusetts v. United States, 333 U.S. 611, 623 (1948).

59. *E.g.*, Cantoria v. Jeffery, 307 Mass. 49, 29 N.E.2d 555 (1940); Schofield v. Rideout, 233 Wis. 550, 290 N.W. 195 (1940); RESTATEMENT, JUDGMENTS § 68, comment *o* (1942).

Even here, there is some authority for a contrary position. Florida Cent. R.R. v. Schutte, 103 U.S. 118 (1880) (stare decisis; *arguendo* as to collateral estoppel); Cold Metal Process Co. v. E. W. Bliss Co., 285 F.2d 231 (6th Cir. 1960); Clark v. Knox, 32 Colo. 342, 76 Pac. 372 (1904).

60. In the patent situation under discussion, the Supreme Court has held that the predictive value of the nondispositive adjudication of the patent's validity is such that, even though the adjudication is not conclusive under the doctrine of collateral estoppel, and even though the defendant, having won in the district court by virtue of the adjudication of noninfringement, has no standing to appeal the adjudication of validity on its merits, nonetheless the court of appeals is under obligation to entertain an appeal for the sole purpose of expunging from the decree the adjudication of validity. Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241 (1939), explained on this basis by Chief Judge Learned Hand in Harries v. Air King Prods. Co., 183 F.2d 158, 161 (2d Cir. 1950). The *Electrical Fittings* case recognizes the propriety of the initial adjudication of validity, and holds merely that in this limited situation the result must be expunged from the decree since no appellate review on the merits is available to the party unfavorably affected by the adjudication.

61. 133 F.2d 541 (2d Cir. 1942), *cert. denied*, 319 U.S. 748 (1943).

appeal, the plaintiff conceded the correctness of the trial court's additional finding that defendant was not infringing. Here, during pendency of the appeal, it became obvious that the issue of validity not only would not, but could not, be dispositive, and Judge Frank properly concluded that the case had become moot. Absent the concession of one issue, however, both would have remained live, and the court might properly have considered both.

The situation is the same when the two issues are, first, whether a precedent ought to be overruled and, second, whether the overruling decision ought to be limited to prospective effect. A defendant relying on the precedent may prevail if the court either decides to retain the precedent or, having rejected it, decides to limit the new rule to prospective effect. Both issues are justiciable, even though the decision of one of them may, in the end, not be dispositive in the collateral estoppel or stare decisis sense.

B. The Separation-of-Powers Argument

Even though prospective limitation fits neatly enough into the traditional framework of article III judicial power—in that it merely adds a potentially nondispositive issue, perhaps one of several such, to a justiciable case or controversy—the separation-of-powers argument remains. It is basically that prospective limitation is a technique suited primarily to law-making, or law-changing, and that its use by courts invites, or perhaps even constitutes, invasion by the judiciary of areas relegated to other institutions of government—in the case of the federal government, to Congress and to the constitutional amendment processes.

Since the Supreme Court has never expressly considered whether it is proper for federal courts to use the prospective limitation technique, it has never directly considered the separation-of-powers argument. Mr. Justice Black, however, urged the argument in a dissenting opinion in *James v. United States:*

> In our judgment one of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking has been the fact that its judgments could not be limited to prospective application. This Court and in fact all departments of the Government have always heretofore realized that prospective lawmaking is the function of Congress rather than of the courts. We continue to think that this function should be exercised only by Congress under our constitutional system.[62]

62. 366 U.S. 213, 225 (1961). Other aspects of *James* are considered in the text accompanying notes 103-07, 170-74 *infra*.

Chief Justice von Moschzisker in 1924 had urged similarly, but more broadly, that prospective limitation of overruling decisions was "plain and outright legislation by the courts,"[63] and arguments have since been made that the pliability of the prospective limitation approach might promote judicial legislation to an undesirable extent,[64] and that normally legislation is a more suitable tool for bringing about desired changes in the law.[65]

Mr. Justice Black's language brings these objections to bear upon the federal courts, and in particular, of course, the Supreme Court of the United States.

The bearing of the doctrine of separation of powers on the availability of prospective limitation as a technique for exercising the federal judicial power appears to raise problems of constitutional proportions, even though the technique does not violate the justiciability requirement imposed by article III. Although measured to some extent by article III, the separation doctrine is more broadly based, and is rooted in various other provisions of the Constitution, as well as in the organizational structure of the first three articles.[66]

In the absence of any obviously relevant specific constitutional language or precedent, it might be reasonable to hope that the constitutional aspect of the separation-of-powers problem could be resolved by an appeal to history. Both Mr. Justice Frankfurter and the first Mr. Justice Harlan suggested that the key to the question of justiciability under the "case or controversy" language of article III was to be found in the *modus operandi* of the courts of Westminster at the time the article was drafted and adopted.[67] Given the apparent hegemony of

63. Von Moschzisker, *supra* note 44, at 426.

64. Note, 47 HARV. L. REV. 1403, 1412 (1934).

65. See Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 292, 118 N.W.2d 795, 803 (1962) (dictum); PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 579 (1953).

66. Opinion of Mr. Justice Jackson in National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 590-91 (1949), quoting Chief Justice Hughes in Principality of Monaco v. Mississippi, 292 U.S. 313, 323 (1934): "The doctrine of separation of powers is fundamental in our system. It arises, however, not from article 3 nor any other single provision of the Constitution, but because 'behind the words of the constitutional provisions are postulates which limit and control.'"

67. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring); see Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 517 (1898) (Harlan, J.). Mr. Justice Harlan actually was speaking of the scope of the jurisdiction of the colonial courts following the American Revolution, but his position appears to have been that article III could not exceed this historically defined

the Blackstonian declaratory-retroactive view of judge-made law at that time,[68] it would appear that the phrase "judicial power" in article III could not have been understood by eighteenth century lawyers to give to the federal judiciary any law-making power in the sense generally recognized today; and hence one might conclude that the separation of powers contemplated by those who drafted, and those who accepted, the Constitution would be violated by adoption of a broader judicial technique that frankly recognizes, and is designed specifically to facilitate, the judicial law-making function. But one might more accurately surmise that since the drafters had not even imagined prospective limitation, they did not contemplate its possible impact upon the separation of powers, and that the creation of the federal judicial power thus does not imply any judgment at all on the question.[69] If this view is taken, the propriety of prospective limitation with reference to the separation of powers remains open for consideration on its merits. But even if the former view is taken, the historical approach does not compel rejection of the prospective limitation technique by federal courts.

The historical argument, in its more ambitious form, attaches to the "judicial power" language of the Constitution and thus would appear to be equally applicable, if valid, to any case that might come before a federal court, at least on a question of federal law.[70] Thus if the ques-

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scope. See FORRESTER & CURRIER, CASES ON FEDERAL JURISDICTION AND PROCEDURE 68 (1962). On the vulnerability of this approach, see note 69 *infra*.

68. See text accompanying notes 8, 9, 12-16 *supra*.

69. Professor Wolfgang Friedmann observed: "Serious lawyers as well as laymen have again advanced the proposition that the Court must stick to the interpretation of the Constitution as it can be deduced from the actual or presumed intention of the Founding Fathers," citing, "among many others, a statement by Chief Judge Felton of the Court of Appeals of Georgia—issued by the Georgia Commission on Education: 'When Is a Supreme Court Decision the Law of the Land?'" FRIEDMANN, LAW IN A CHANGING SOCIETY 43 (1959). Professor Friedmann regarded this as a "patently absurd proposition," and quoted the following passage of Learned Hand:

> "Not only is it true that, 'if by the statement that what the Constitution meant at the time of its adoption is what it means to-day it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation'; but it is also impossible to fabricate how the 'Framers' would have answered the problems that arise in a modern society had they been reared in the civilization that has produced those problems. We should indeed have to be sorcerers to conjure up how they would have responded."

HAND, THE BILL OF RIGHTS 34-35 (1958), cited in FRIEDMANN, *op. cit. supra* at 43.

70. As to departures from precedent in applying state law, the retroactivity question would appear to be controlled by the doctrine of the *Erie-York-Byrd* line of deci-

tion is one of federal common law, not requiring interpretation of a federal statute or of the Constitution, the original understanding of "judicial power" indicates that federal common law does not change, but rather that the Supreme Court's appreciation of it becomes more

sions. Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Byrd v. Blue Ridge Rural Elec. Co-op., Inc., 356 U.S. 525 (1958). If a federal court may never overrule an obsolete state precedent, as Judge Jones of the Fifth Circuit asserted in Polk County v. Lincoln Nat'l Life Ins. Co., 262 F.2d 486, 490 (5th Cir. 1959), the availability of the prospective overruling technique in federal courts need never arise in this context. But diversity jurisdiction might lead a federal court to decide a case of first impression that the state courts have not had presented to them, as in Daily v. Parker, 152 F.2d 174 (7th Cir. 1945). Further, it appears that Judge Jones' position has been rejected by the Supreme Court. In Nolan v. Transocean Air Lines, 365 U.S. 293 (1961), the Court set aside a Second Circuit decision for mechanically following an unbroken line of state intermediate appellate court decisions rather than dictum from a later state supreme court decision. The Court directed the federal appellate court to consider the dictum and to give it and the older holdings the same relative weight as would be afforded them by the highest court of the forum state. On remand, the court of appeals first commented, "we just don't know," before reaching what it referred to as a "two-dimensional surmise," 290 F.2d 904, 905-06 (2d Cir. 1961), and again favored the old holdings over the more recent dictum. The Supreme Court denied certiorari, 368 U.S. 901 (1961). Taking similar positions are Mason v. American Emery Wheel Works, 241 F.2d 906, 909 (1st Cir.), *cert. denied*, 355 U.S. 815 (1957) ("Of course it is not necessary that a case be explicitly overruled in order to lose its persuasive force as an indication of what the law is."), and Cooper v. American Airlines, Inc., 149 F.2d 355, 359 (2d Cir. 1945) ("What would be the decision of reasonable intelligent lawyers, sitting as judges of the highest New York court, and fully conversant with New York jurisprudence?"). See also Note, 59 COLUM. L. REV. 504 (1959).

In any event, the Court's position in the *Nolan* case indicates that, should a federal court feel compelled to depart from antiquated state precedent, it should be bound in doing so by the choice that the state court of last resort would make between prospective limitation and retroactive application. And certainly if the state supreme court has overruled a case with prospective effect only, federal courts ought to give the new decision prospective effect only. It is established, of course, that if the state court's overruling decision is, as it has been in most cases, with retroactive effect, federal courts must apply it retroactively, even at the appellate stage in pending litigation. Huddleston v. Dwyer, 322 U.S. 232 (1944); Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941).

There may be a difference, however, between following state law as to the question whether a state overruling decision is to be given retroactive effect in a federal court and adopting a state's practice of prospective overruling when the federal court is called upon to depart from a state precedent. The latter problem, it seems to me, potentially involves (as does the problem of jury trial) "an essential characteristic" of the federal "independent system for administering justice to litigants who properly invoke its jurisdiction." Byrd v. Blue Ridge Rural Elec. Co-op., Inc., *supra* at 537. Thus if prospective overruling is beyond the pale of article III, the prevailing state practice surely cannot legitimate it. But the problem is moot if I am correct and the practice is proper in federal courts. In this event, it would appear that federal courts may and should follow state practice in deciding whether to overrule with prospective effect only or with retroactive effect as well.

acute. Changing the law is a function intended to be left to the legislative branch. Similarly, judicial reinterpretation of statutory language is proper only if understood as an altered judgment as to the original meaning of the statute, and violates the historically contemplated separation of powers if engaged in for the purpose of change, which is a power given only to the legislative branch. If the question is one of constitutional interpretation, "judicial power" cannot be regarded as having any additional meaning; reinterpretation is a judicial function only when its purpose is better to ascertain original meaning. Change here is left not to Congress, but to the constitutional amending processes. In short, if the original understanding of "judicial power" were accepted as the sole determinant, it would appear to draw the same line in all of these areas: the federal courts invade fields left by the Constitution to other institutions of government if they reverse precedent for any reason other than recognition of a result that has always been correct; facilitation of judicial law-making as such is encouragement to the federal judiciary to make such invasions.

Adherence to this historical evaluation of "judicial power" would certainly be embarrassing in a number of areas. The constitutional basis for the *Erie* decision,[71] for instance, would be destroyed, or at least rendered precarious,[72] and a lot else besides. But there is no need

71. Erie R.R. v. Tompkins, *supra* note 70.

72. See Hill, *The Erie Doctrine and the Constitution*, 53 Nw. U.L. Rev. 427, 437-48 (1958); Hill, *The Erie Doctrine in Bankruptcy*, 66 Harv. L. Rev. 1013, 1024-35 (1953), to the effect that the practice under Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), became unconstitutional by the time of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), essentially because of "a changed jurisprudence rather than a changed view of the Constitution." 53 Nw. U.L. Rev. at 443.

While I am inclined to agree with Professor Hill, a constitutional basis for *Erie* can be derived even in Blackstonian theory. This is an idea for which I am indebted to a conversation with Professor Roy A. Schotland. Injection of the problem of a dual court system—with which declaratory theory had never had to reckon—could have resulted in the institution of a federal judicial power by the framers less extensive with regard to state common law than classic declaratory theory would otherwise have ordained. The seeds of this idea are present in Professor Hill's discussion of sovereign "legislative jurisdiction" as a factor that should limit a court's law-making power. 53 Nw. U.L. Rev. at 445-47. While I would hesitate to project consciousness of this possibility backwards to the framers of article III, this need not be determinative. See note 69 *supra*. And in any event, there are indicia in Mr. Justice Story's opinion in *Swift v. Tyson* that he was possibly making a choice dictated by policy rather than by unthinking adherence to declaratory theory; notably his willingness to except from federal judicial independence the areas of statutory interpretation, and "rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character." 41 U.S. (16 Pet.) at 18.

to dwell on the consequences of making the Blackstonian declaratory theory constitutional dogma, because no one would seriously suggest that this be done. It having long since been generally accepted that the Constitution is a living document, one must be cautious in pushing historical interpretations of its meaning.[73]

Moreover, it should be borne in mind that the facilitation and encouragement of judicial law-making is by no means the sole purpose of the prospective limitation technique. An overruling decision may well have no "legislative" content. That is, it may not be concerned with "change" at all; it may simply be intended to state more accurately what has always been the law. Such a decision would fit precisely into the Blackstonian format, but the prospective limitation technique is still relevant. Interests may have been created in reliance on the old precedent that are deserving of protection; and society may have a predominant interest in stability in the affected area, if a rule of property, or similar institutional rule demanding stability, is involved.[74] These interests are as much entitled to protection when the prior decision is later recognized as having been "wrong" when rendered as they are when the court consciously undertakes to change a formerly "right" rule. The prospective limitation technique facilitates unquestionably proper Blackstonian overruling as well as objectionable judicial legislation and, when properly utilized, is a valuable instrument for preventing gross miscarriages of justice resulting from departure from precedent in either case.[75] It is, in short, an appropriate technique for the exercise of federal "judicial power," even as originally understood.

Mr. Justice Black's argument is not limited to this vulnerably ambitious historical approach to article III, however. Even if the prospective limitation technique does not exceed the historically derived scope of article III judicial power, it may in some way violate the underlying postulates of separation of powers, and these may best be functionally, rather than historically, understood. And the argument makes its appeal to wisdom and policy, in any event. Even if constitutional boundaries of separation of powers are not crossed by prospective overruling, the Constitution need not be read as recommending that, in the conduct of government, each branch exercise all power given, if to do so would create unnecessary friction or otherwise disturb the har-

73. See note 69 *supra*.

74. See Part III *infra*.

75. Thus even at the zenith of declaratory theory, retroactive application was denied in some extreme cases. See notes 19-21 *supra*.

monious operation of a government of delegated and separated powers.[76] Even if the judicial branch may, under the Constitution, avail itself of the prospective limitation technique, there may thus be serious reasons why it should choose not to do so. Mr. Justice Black's argument ought to be reconsidered with these possible meanings in mind.

Whether constitutional in the strict sense or discretionary, the argument runs along similar lines. Forcing courts to overrule retroactively or not at all tends to minimize objectionable judicial legislation—that is, judicial legislation that is in some way disruptive of the harmonious functioning of a multipartite government—by rendering it difficult for a court to overrule a prior decision because of the injury that will result from retroactive application of the newly announced rule to interests that have been created in reliance upon the old rule. This argument, it should be noted, applies to any exception to retroactive application of an overruling decision, whether made by the overruling court or by another in a later case. The hobble, though self-imposed in any area where the Court might choose or feel constitutionally compelled to adopt it, is itself nonselective. It would operate equally to discourage all departure from precedent, whether departure in any particular case might be eminently desirable, and inoffensive to other branches of government, or the most objectionable kind of judicial law-making. In cases where the pressure to overrule is so strong as to brook no opposition, the hobble results in potential individual injustice of the grossest sort. Whatever the contribution to smooth and harmonious functioning of government, the device is unnecessarily clumsy and exacts too high a price in unfairness to private persons. Surely there is something unattractive about a course of "self-restraint" which works thus indirectly, which gives the courts pause before they act in a certain way because whenever they do so it is so very hard on innocent bystanders. This mode of judicial self-restraint seems a particularly blunt instrument when it is borne in mind that there is no correlation between situations where there will be a tendency to "legislate" and the existence of "hostages," of persons who have acted in reliance on the old law. People are not much less likely to rely on bad law which should be overruled. Presumably there is as much bad prop-

76. The abstention cases are in point, *e.g.*, Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), as is the judicially created doctrine requiring exhaustion of administrative remedies, observed as early as Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908) (Holmes, J.).

erty law—on which men are obliged to rely regardless[77]—as there is procedural law—on which there is apt to be less reliance.

If it is necessary for the federal courts to use this mechanical restraint at all—and it is unsettling to think that they should have to—it seems clear that it should apply only in cases where there is a risk of disruption of intragovernmental harmony. *James v. United States*,[78] the case in which Justice Black advanced the argument, involved reinterpretation of a federal statute after the Court's prior interpretation had survived a major revision of the statute without legislative rejection. It was against this background that he spoke. And his argument might be limited to overruling decisions that reinterpret federal statutes, or that do so after legislative consideration of the precedent under attack. It is here that harmony between Court and Congress is most directly at stake. And even here, the weight of the argument varies depending upon the statutory milieu to which it is applied.

In *James*, for example, the reversal was upon a narrow and isolated point, and the statute involved represented a mighty legislative effort—the Internal Revenue Code—and Congress had in the interim expended considerable energy and attention in revising it.[79] Judicial self-restraint might well have been desirable. But it does not follow from this that the Court ought to accord the same weight to legislative inaction with regard to all statutory interpretation.

Consider two situations that might arise in connection with section 301 of the Labor Management Relations Act.[80] The initial determination that that piece of legislation was intended to authorize the creation of a body of federal common law to govern the enforcement of collective bargaining agreements was of tremendous importance and was doubtless studied and evaluated by everyone, in Congress and out, interested in labor law and the broader issues involved.[81] And yet Con-

77. See, *e.g.*, the discussion of Donohue v. Russell, 264 Mich. 217, 249 N.W. 830 (1933), in Kocourek & Koven, *Renovation of the Common Law Through Stare Decisis*, 29 ILL. L. REV. 971-72 (1935).

78. 366 U.S. 213 (1961). For further discussion of *James*, see notes 103-07, 170-74 *infra* and accompanying text.

79. INT. REV. CODE OF 1954. This act completely recodified federal revenue taxation laws. See 68A Stat. 1-934 (1954).

80. 29 U.S.C. § 185 (1958).

81. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). The case received wide attention. See Bickel & Wellington, *Legislative Purpose and the Judicial Process. The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Bunn, *Lincoln Mills and the Jurisdiction To Enforce Collective Bargaining Agreements*, 43 VA. L. REV. 1247 (1957); Feinsinger, *Enforcement of Labor Agreements—A New Era in Collective Bargaining*, 43

gress has not legislatively overruled or amended the action of the Court in subsequent sessions, despite the fact that there has been a major legislative effort in the labor field[82] since the *Lincoln Mills* decision.[83] It is not unreasonable in these circumstances to assume that congressional acquiescence by inaction is meaningful, that it is conscious and deliberate, and that the courts should be mindful of it. Other considerations apart, it might well be appropriate for the Supreme Court to suppress a later inclination to overrule *Lincoln Mills* in the face of such acquiescence. Suppose, on the other hand, that the Supreme Court had become dissatisfied with some narrow rule it had formulated under the broadly interpreted section 301. Again, suppose that Congress has acquiesced by failing to pass on the point in subsequent labor legislation. This acquiescence would certainly be less significant than that in the *Lincoln Mills* situation, because the attention of the legislators was less likely to have been focused on the rule in the first place. Moreover, in developing principles to govern collective bargaining agreements covered by the act, the Court requires considerable leeway to correct its own mistakes;[84] and, at least until Congress directs further attention to section 301, it seems unlikely that the Court would tread upon congressional toes by doing its best with the statutory material at hand. Thus an undiscriminating device to impose self-restraint in all areas where Congress has acted and then failed to *react* to a court interpre-

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VA. L. REV. 1261 (1957); Kramer, *In the Wake of Lincoln Mills*, 9 LAB. L.J. 835 (1958); Pirsig, *The Minnesota Uniform Arbitration Act and the Lincoln Mills Case*, 42 MINN. L. REV. 333 (1958); *The Supreme Court, 1956 Term*, 71 HARV. L. REV. 83, 173 (1957); Note, 57 COLUM. L. REV. 1123 (1957); Note, 42 MINN. L. REV. 1139 (1958); Comment, 30 ROCKY MT. L. REV. 62 (1957); Comment, 32 TUL. L. REV. 447 (1958); Comment, 25 U. CHI. L. REV. 496 (1958); Comment, 35 U. DET. L.J. 376 (1958); 43 CORNELL L.Q. 503 (1958); 36 N.C.L. REV. 215 (1958); 12 SW. L.J. 123 (1958); 9 SYRACUSE L. REV. 110 (1957); 1957 U. ILL. L.F. 528; 11 VAND. L. REV. 243 (1957); 3 VILL. L. REV. 109 (1957).

82. Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-530 (Supp. V, 1964). Although the case invoked widespread interest and attention, see the section entitled *Labor Relations Cases* in Conference of Chief Justices, *Report of the Committee on Federal-State Relations As Affected by Judicial Decision* (Aug., 1958), in PRITCHETT, CONGRESS VERSUS THE SUPREME COURT: 1957-1960 app. 2 (1961) and materials cited in note 81 *supra*, no mention of the decision was made in the congressional reports on the bill, see 1959 U.S. CODE CONG & AD. NEWS 2813, and a more-than-cursory perusal of the records of the debates on the bill turns up no evidence of concern either. See 105 CONG. REC. 5974, 5983, 6103, 6109, 6131, 6210, 6228, 6230, 6237, 6280, 6284, 6296, 6389, 6393, 6409, 6425, 6434, 6436, 6461, 6515, 6638, 6715, 15516, 15660, 15882, 17839, 17898 (1959).

83. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

84. For example, a decision as to what constitutes acceptance of an offer in one industrial context might prove to be ill-suited to others or generally unworkable.

tation appears inappropriate to the purpose of minimizing objectionable, as distinguished from desirable, judicial law-making in the federal system. As I have suggested, I think this purpose would be best served, and at the least cost to other interests, by *ad hoc* consideration, when precedent is questioned, of the impact that overruling would have upon the other components of government.[85]

If this is true where Congress has acted, it would appear to be even more clearly so where Congress has not. In the area of federal common law, analysis of the kind performed by Mr. Justice Rutledge in *United States v. Standard Oil Co.*[86] seems sufficient to differentiate between situations in which the Court should and should not defer to legislative action. Recognizing the Court's creative power in the federal common-law area, Mr. Justice Rutledge refused to create a new tort liability to the United States for expenses caused by injury to a federal employee, despite analogous doctrinal developments in general tort law:

> Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court or the other federal courts, is the custodian of the national purse. By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs. . . .
>
> Moreover Congress without doubt has been conscious throughout most of its history that the Government constantly sustains losses through the tortious or even criminal conduct of persons interfering with federal funds, property and relationships. We cannot assume that it has been ignorant that losses long have arisen from injuries inflicted on soldiers such as occurred here. . . .
>
> When Congress has thought it necessary to take steps to prevent interference with federal funds, property or relations, it has taken positive action to that end. We think it would have done so here, if that had been its desire. This it still may do, if or when it so wishes.
>
> In view of these considerations, exercise of judicial power to establish the new liability not only would be intruding within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action. To accept the challenge, making the liability effective in this case, also would involve a possible element of surprise in view of the settled contrary practice, which

85. Every overruling decision requires *ad hoc* determination anyway, so that no great additional burden to judicial efficiency would be required by this suggestion.

86. 332 U.S. 301 (1947).

> action by Congress would avoid, not only here but in the many other cases we are told may be governed by the decision.[87]

The concluding sentence suggests that Justice Rutledge assumed the new rule would be retroactive if adopted, but the important point here is that he decided to adhere to precedent primarily because of an individualized judgment on the appropriate branch of government to create the new rule in question. Self-restraint of the sort exercised in the *Standard Oil* case seems entirely adequate in this and other areas for the preservation of intragovernmental harmony. It should be stressed that it is not the fact that a particular change in decisional law is given prospective effect that makes the action disruptive of harmony. It is the change itself. Prospectivity is potentially disruptive only in that it may induce a greater willingness to act at all, to overrule. That decision having been made, it is no boon to other branches of government that the change be made retroactive. Indeed, a retroactive change is often apt to be more offensive to other branches than a prospective change. If self-restraint in the interest of harmony is appropriate, it should be exercised at the point when it is meaningful, as it was in *Standard Oil;* that is, at the point when the court decides whether or not to change the existing rule. The simple point: prospective limitation is not itself an offense against intragovernmental harmony.

In the area of constitutional interpretation, the argument against the prospective limitation technique on the basis of intragovernmental harmony seems to have a very different kind of weight. The constitutionally sanctioned amendment processes, rather than Congress, are the governmental institution whose proper field of action ought not to be invaded by the Court. These processes are made up of an amalgam of Congress, state legislatures or conventions, and possibly a national convention.[88] This institution of government, in any event, cannot strike back as readily as Congress can. Long-term and serious appropriations of the amendment power by the Court are perhaps rendered more dangerous, in the long run, by this factor.[89] In any event, change,

87. *Id.* at 314-16.

88. U.S. Const. art. V.

89. Possibly, as Learned Hand suggested, a nation that needs saving from itself by judges is beyond this kind of salvation. Hand, The Bill of Rights 73 (1958). If this is true, it would be far better for national intransigence to judicial salvation to make itself felt through established, well-oiled legislative machinery. Regular, frequent institutional adjustments seem preferable to the kind of institutional alteration likely to come when pressures have built up sufficiently to set the amendment processes in motion.

whether regarded as correction of old mistakes, adapting old concepts to changed social conditions, or simply judicial law-making, has occurred and will continue to occur in the interpretations placed by the Court on constitutional language.[90] Again, it appears that across-the-board rejection of the prospective limitation technique is not an appropriate device for discriminating between legitimate and illegitimate exercise of the Court's judicial power. Just as in the cases of statutory interpretation and federal common law, there are precedents which need overruling, as well as those which ought to command adherence, and *ad hoc* discrimination between them seems preferable to imposition of a rule that does not perform this purpose. And when it is determined that precedent should and may safely be rejected, the fact of change, rather than its genesis, creates the need for prospective limitation of the new rule in appropriate situations.

Consider, for example, the potential impact of retroactive application of *Brown v. Board of Education*.[91] While it has not been discussed in those terms, it seems clear that the rule derived in *Brown* was limited to prospective effect, else how explain the Court's order the following fall that the rule be complied with only with "deliberate speed?"[92] Given the normal retroactive application, ought not all state officials responsible for registration of pupils in public schools to have complied immediately? Indeed, might not a state official who had, in reliance upon *Plessy v. Ferguson*,[93] denied a Negro child admission to an all-white school on the basis of race be rendered civilly liable for this intentional deprivation of a constitutional right? Yet this appears to be a clear case for protection of those who act in reliance upon contemporaneous law.[94] In the case of *Brown*, analysis of the problem of retroactive application was apparently forestalled by the announcement, in the Court's original opinion, that the newly recognized principle would require conscious, planned implementation,[95] but the result seems sound on the basis of the values discussed in the

90. See, *e.g.*, Bernhardt, *Supreme Court Reversals on Constitutional Issues*, 34 CORNELL L.Q. 55 (1948); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736-58 (1949); *Precedent and the Constitution*, 3 RACE REL. L. REP. 395 (1958). For an earlier catalog see Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932). For a more recent one see 1B MOORE, FEDERAL PRACTICE ¶ 0.402 [3.-1] (2d ed. 1965).

91. 347 U.S. 483 (1954).

92. 349 U.S. 294, 301 (1955).

93. 163 U.S. 537 (1896).

94. See Part III *infra*, for a discussion of reliance as a criterion for prospective limitation.

95. See Brown v. Board of Educ., 347 U.S. 483, 495-96 (1954).

following section.[96] It is, of course, true that the Court took a monumental step in the *Brown* decision, one which many would have preferred to leave to Congress or the processes of constitutional amendment. Nor can it be denied that, if the Court had felt compelled to give *Brown* retroactive effect or, at least, instant implementation, it might not have acted at all. For those who agree that this radical change might better have been left to Congress, the case superficially appears to give weight to the argument of those who would make all decisions retroactive as a brake on judicial legislation. But suppose one agrees that the *Brown* decision was an appropriate exercise of judicial power. Had the retroactive hobble been applied, the Court would either have had to take and decide the case as it did—at a great and passion-provoking cost to officials who had relied on *Plessy*—or decline to take the case, thus allowing a vast denial of critical constitutional rights to continue unchecked at whatever cost to the image of justice. It is not lightly to be assumed that the Supreme Court cannot properly gauge its constitutional scope or that it did not do so in the *Brown* case. If the Court was right to act in *Brown*—as one may well conclude—how unreasonable to force it to act retroactively and to work tremendous hardships unfairly. How much better to forego the mechanical restraint, and to rely on the Court's expert and sensitive feel for the proper limits of its sphere of action and the needs of a government of separated powers.

Against the need for the prospective limitation technique in federal constitutional interpretation, there stands for consideration the idea that the Court should concern itself with the appearance of what it does, as well as the fact. Should the Supreme Court be influenced, in deciding whether or not to utilize the technique of prospective limitation, by concern for the image that will thereby be projected to Congress, to the constituents of the constitutional amending processes, or the public at large? Mr. Justice Frankfurter's assertion[97] may be converted into a question: Should candor compel public acknowledgement by the Court that what it is doing in a given case is making law? Or would the Court be better advised to attempt to serve up new rules in old packages, to make law in the guise of finding it, rather than admit to a practice which may be unpalatable to other institutions of government or to the public?

The prospective limitation technique does reveal to public scrutiny

96. See Part III *infra*.

97. Griffin v. Illinois, 351 U.S. 12, 25 (1956).

that a new rule is pragmatically a new rule. But this is fairly obvious anyway. If interests established in reliance upon rejected precedent are not protected, it seems likely that the newness of the new rule will be even more keenly realized. If civil liability for tortious deprivation of civil rights had been imposed retroactively upon state officials who had barred admittance of Negroes to public schools prior to *Brown*, for instance, the Blackstonian symmetry of retroactive application would not have stilled the protests that the Court had amended the Constitution. The symmetry would have been more than offset by outrage at the failure to protect public officials who discharged their duties in accordance with the law as then announced. In short, it does not seem that adherence to the principle of retroactive application would serve any useful purpose in rendering judicial changes of law more acceptable, or less unacceptable. And even if it did, I would find myself hesitant in the extreme to suggest the propriety of elevating palliation of potential criticism to a principle of judicial conduct.

The Supreme Court has yet to rule squarely on the question whether federal courts should utilize the prospective-effect approach to overruling decisions in appropriate circumstances, though the issue has come up in several cases. Mr. Justice Black himself, in a dissent in *Mosser v. Darrow*,[98] urged the Court to use the technique, and in *England v. Louisiana State Board of Medical Examiners*,[99] the Court did in fact limit a decision to prospective effect.

Mr. Justice Frankfurter suggested similar treatment of the decision in *Griffin v. Illinois*.[100] As in *Mosser* and *England*, the Court was not faced squarely with the problem of overruling a prior decision, but rather with a case of first impression. Mr. Justice Frankfurter suggested, however, that "candor compels acknowledgement that the decision . . . [was] a new ruling."[101] Urging prospective limitation, he said:

> We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights. It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law.[102]

98. 341 U.S. 267, 275 (1951), discussed in text accompanying notes 155-58 *infra*.

99. 375 U.S. 411 (1964), discussed in text accompanying notes 159-61 *infra*.

100. 351 U.S. 12, 25-26 (1956) (concurring opinion).

101. *Id.* at 25.

102. *Id.* at 26.

In *James v. United States*,[103] the Court in effect limited an overruling decision to prospective effect, though it must be conceded that it did so in a curious way and with notable lack of unanimity. The case is discussed in some detail in the final section.[104] To give a brief resumé, six Justices favored overruling the old case under attack; three would have let it stand. Three of the six Justices favoring overruling wanted to limit the new precedent to prospective effect for reasons discussed below,[105] and, with the votes of the three Justices who did not want to overrule at all, were able to achieve this result. Thus, the old case was overruled as a precedent, but the new rule was not applied in the instant case. In effect this was a typical prospective overruling, but only three Justices expressly favored an approach similar to that technique.[106] Justices Black and Douglas, whose votes against overruling were needed to accomplish the prospective limitation, expressly objected to the "prospective way in which this [overruling] is done."[107]

The net effect of these decisions is that the Supreme Court has appeared to use the prospective technique in some cases, has declined to do so in others, but has yet fully to articulate a position on the issue. For the reasons discussed in this section it is to be hoped that the Court will decline to take the position that federal courts cannot act prospectively; it would certainly be hard to square some past decisions with that view. Further, it is to be hoped that in an appropriate case the Court will expressly approve the use of the practice so that the federal courts will feel free to use a technique that can significantly improve the quality of justice dispensed by those courts in the relatively few cases which call for overruling or a major change in the law.

III. Criteria for Limiting Decisions to Prospective Effect

When overruling decisions have been denied retroactive effect, it has almost always been for either or both of the following reasons: (1) to protect persons who have ordered their affairs in reliance upon what they contemporaneously perceived to be the law;[108] (2) to

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103. 366 U.S. 213 (1961).

104. See text accompanying notes 170-74 *infra*.

105. *Ibid.*

106. Mr. Chief Justice Warren and Justices Brennan and Stewart. James v. United States, 366 U.S. 213, 221 (1961) (opinion of Warren, C.J.).

107. 366 U.S. at 223 (Black, J., dissenting).

108. See, *e.g.*, cases cited in notes 125-27, 132, 133 *infra*. "The bond common to almost all cases refusing to apply a decision retroactively is the element of justifiable reliance. The primary purpose of limiting a decision to prospective application is to

protect stability in an area where society has recognized stability to be of particular importance.[109] Of these two reasons, the first is a recognition of the value of certainty in law; it protects the individual's right to rely on existing law in managing his affairs. The second is a recognition of the value of stability in the operation of certain social institutions. These are but two of the social values that are normally protected by the doctrine of stare decisis when precedent is adhered to. The problem for analysis here, however, is the scope that ought to be given to a departure from precedent; a proper perspective requires that attention be given not solely to these two values, but to the other values normally protected by adherence to precedent as well, and to the impact upon all of these values first, of any departure from precedent, and second, of a departure from precedent that is limited to prospective effect. Finally, in order to be reasonably complete, it may be necessary for the analysis to take account of the value that induces the overruling court to depart from precedent in the first place.

In attempting to identify "values" that merit consideration when a court must decide whether to depart from precedent, I do not mean to imply any judgment as to the immutability, absoluteness, or self-evidence of the values identified, nor as to the tenability of any particular ethical or philosophical process of derivation or justification by which they might be supported. All I assert here is that these are values that do in fact support our general adherence to the doctrine of stare decisis; and that therefore when questions are raised as to departures from that doctrine, and the scope of such departures, these values should be taken into account.

The general practice of adherence to precedent is of course grounded to a considerable extent in factors of habit, tradition, historical accident, and sheer intellectual inertia.[110] But in addition to such social and psychological roots, it also seems to rest on the following values.

(1) *Stability*. It is clearly socially desirable that social relations should have a reasonable degree of continuity and cohesion, held

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prevent the impairment of rights acquired in reliance on a prior decision." Note, 46 IOWA L. REV. 600, 601 (1961). "The only blanket test which might be at all workable would be to make prospective operation depend upon 'reliance'." Note, 60 HARV. L. REV. 437, 440 (1947). Compare Note, 47 HARV. L. REV. 1403, 1404 (1934), describing the jurisprudence as verbally adopting the formula that "overruling decisions operate retroactively unless they would disturb vested contract or property rights acquired in reliance on decisions involving the construction or validity of statutes."

109. See, *e.g.*, cases cited in notes 125-27, 132, 133 *infra*.

110. See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 21-22 (1921).

together by a framework of reasonably stable institutional arrangements. Continuity and cohesion in the judicial application of rules is important to the stability of these institutional arrangements, and society places great value on the stability of some of them. Social institutions in which stability is recognized as particularly important include the operation of government, the family, ownership of land, commercial arrangements, and judicially created relations (as manifested in the doctrine of res judicata).[111]

(2) *Protection of Reliance.* As previously mentioned, the value here is the protection of persons who have ordered their affairs in reliance upon contemporaneously announced law. It is obviously desirable that official declarations of the principles and attitudes upon which official administration of the law will be based should be capable of being taken as determinate and reliable indications of the course that such administration will in fact take in the future. Private citizens, lawyers, public officials, and judges themselves should not be left in doubt about what "the law" requires, but rather, should be able generally to take past declarations as authoritative assurances upon which prediction of future decisions, and arrangement of present affairs, can reasonably be based.[112] This value might be regarded as a personalized variation on the value of stability; but it is broader in that it is recognized even where no social institution is involved, and stability as such is unimportant.

(3) *Efficiency in the Administration of Justice.* If every case coming before the courts had to be decided as an original proposition, without reference to precedent, the judicial work-load would obviously be intolerable. Judges must be able to ease this burden by seeking guidance from what other judges have done in similar cases.[113]

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111. On protection of stability by res judicata and related doctrines see citations in STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS 250 n.110 (1964).

On the clash between the need for stability and the need for socially adaptive change as a fundamental tension in the system of precedent, see *id.* at 231-34; CARDOZO, PARADOXES OF LEGAL SCIENCE 1-30 (1928).

112. *Cf.* FULLER, THE MORALITY OF LAW 35, 51, 57-58, 79-81 (1964).

113. Karl Llewellyn observed that judicial efficiency is served in more ways than one by the system of precedent:

> To continue past practices is to provide a new official in his inexperience with the accumulated experience of his predecessors. If he is ignorant, he can learn from them and profit by the knowledge of those who have gone before him. If he is idle he can have their action brought to his attention and profit by their industry. If he is foolish he can profit by their wisdom. If he is biased or corrupt the existence of past practices to compare his action with

(4) *Equality*. By this is meant the equal treatment of persons similarly situated. It is a fundamental ethical requirement that like cases should receive like treatment, that there should be no discrimination between one litigant and another except by reference to some relevant differentiating factor. This appears to be the same value that requires rationality in judicial decision-making, which in turn necessitates that the law applied by a court be consistently stated from case to case.[114] The same value is recognized in the idea that what should govern judicial decisions are rules, or at least standards.[115] The value of equality, in any event, appears to be at the heart of our received notions of justice.[116]

(5) *The Image of Justice*. By this phrase I do not mean that any judicial decision ought to be made on the basis of its likely impact upon the court's public relations, in the Madison Avenue sense, but merely that it is important not only that the court provide equal treatment to persons similarly situated, but that, insofar as possible, the court should appear to do so. Adherence to precedent generally tends not only to

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gives a public check upon his biases and his corruption, limits the frame in which he can indulge them unchallenged.
LLEWELLYN, THE BRAMBLE BUSH 65-66 (1960).

Judicial efficiency appears to explain the existence of a doctrine of case-precedent in the civil law, despite civilian theory that "law is a solemn expression of legislative will," La. Civil Code art. 1 (1870), and that therefore codal provisions, rather than judicial interpretations of them, are to be adhered to and extended analogically. Despite these principles, once a consistent line of judicial interpretation has been established, it will normally be respected under the doctrine of *jurisprudence constante*. See, e.g., Borchard, *Some Lessons From the Civil Law*, 64 U. PA. L. REV. 570 (1916); Lambert & Wasserman, *The Case Method in Canada and the Possibilities of Its Adaptation to the Civil Law*, 39 YALE L.J. 1, 14-15 (1929).

For comparison of stare decisis and *jurisprudence constante*, see Goodhart, *Precedent in English and Continental Law*, 50 L.Q. REV. 40 (1934); Henry, *Jurisprudence Constante and Stare Decisis Contrasted*, 15 A.B.A.J. 11 (1929); Lobingier, *Precedent in Past and Present Legal Systems*, 44 MICH. L. REV. 955 (1946); Small, *Stare Decisis on Two Continents: A Saga of Gain and Loss*, 18 ROCKY MT. L. REV. 97 (1946).

On the struggle between the two doctrines in a mixed civil-common law jurisdiction, see Ireland, *Louisiana's Legal System Reappraised*, 11 TUL. L. REV. 585 (1937); Daggett, Dainow, Hébert & McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12, 15-24 (1937).

114. This does not make it either necessary or sufficient that there should be a mere absence of logical contradictions between particular rules and decisions: What is required is that these should be "consonant" or "compatible" with each other. *Cf.* FULLER, *op. cit. supra* note 112, at 65-70, where the matter is primarily discussed, however, in terms of inconsistent statutes.

115. See PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT *passim* and especially 36-45 (1963).

116. See *id.* at 67-71.

assure equality in the administration of justice, but also to project to the public the impression that courts do administer justice equally.

Of course, each time a court adheres to a thoroughly outmoded precedent, the opposite may be true. Thus if the Supreme Court were still following *Plessy v. Ferguson*[117] in the face of radically changed attidues toward racial discrimination, the Court's consistency would hardly seem a hallmark of justice to the great majority of people, who would think the old and new decisions embodied equality only in the sense that both were equally, and fundamentally, unjust. This is not to denigrate equality, but merely to say that it is only one ingredient of justice and of the image of justice. Sometimes justice, and its image as well, require a departure from precedent; this, however, is despite the damage done to the value of equality. And equality, though it must necessarily suffer from departure from precedent, retains its character as a prime ingredient of justice, and of the image of justice, demanding protection to the extent possible. This may lead to a decision to honor precedent, especially in the absence of social change or of moral overtones to the question at issue; and, when it is necessary to reject an old decision, this value may demand that the new rule be applied to all persons similarly situated, though this requires retroactive application in some instances.

As suggested in the introduction, equality of treatment is especially important to the image of justice where ethical or moral judgments are involved. For whatever reason, men do tend to "universalize" these judgments, do claim for current notions of right and wrong a universal application.[118] There is no call here to muse upon our presistent taste

117. 163 U.S. 537 (1898).

118. See, *e.g.*, CAHN, THE SENSE OF INJUSTICE 24-27 (1949). Professor Cahn suggested that this phenomenon is associated with the human capacity for imagination, and thus tends to shade off when we contemplate injustices—whether consisting of unequal treatment or any other kind—that are sufficiently removed from our common experience by time, distance, and nature.

It should be observed, however, that even a rule devoid of ethical content cannot be applied unequally without damaging the image of justice. Llewellyn pointed out:

> I do not know why, nor do I know how, but I observe the fact that what one has been doing acquires in due course another flavor, another level of value than mere practice; a flavor on the level of policy, or ethics, or morality. What one has been doing becomes the "right" thing to do; not only the expected thing but the thing whose happening will be welcomed and whose failure to happen will be resented.

LLEWELLYN, THE BRAMBLE BUSH 65 (1960). Llewellyn suggests that this is true of applications of law as well as in matters of individual habit and social intercourse. Possibly, a partial explanation is the potential for inequality wrought by any change of law.

for absolutes in what we increasingly have come to think of as a relativistic world. The existence of the propensity is an undeniable and, I would make bold to say, rather attractive human phenomenon, an old-fashioned and socially valuable inflexibility regarding at least a few ideas about basic fairness, despite the demonstrable fact that historically these ideas do change, and within a single generation. The point is that, given this strong tendency to universalize ethical judgments, any application of different rules to persons similarly situated—when the rules embody ethical values—tends to impair the image of justice, and to undermine public confidence in the administration of law and the rule of law itself.

All of these five values are normally protected by adherence to precedent. When a precedent is overruled, and the newly announced rule is given retroactive application, as it generally has been in the common law tradition, all of these values are impaired in some degree. Institutional stability—land titles, marriage, and the like—tends at least temporarily to be disturbed, though the altered institution hopefully will be sounder in the long run. Depending on the precedential effect given the new rule, specific interests created in reliance upon perceived law are disappointed. As to efficiency, the court's other business must cease while it ponders whether, and to what extent, to reject precedent; courts owing obedience to it have a new rule to learn, and may be required to determine for themselves, subject to appellate correction, whether the new rule, once learned, is to be applied retroactively. There is a necessary impairment of equality since, even though given retroactive application, the newly announced rule is incapable of reaching some transactions that have been irremediably concluded on the basis of the old rules—as, for example, when a state convict has served a sentence or been executed under the regime of a controlling decision subsequently overruled or revised, such as *Betts v. Brady*[119] or *Wolf v. Colorado*;[120] or when a Negro child has completed a segregated education under the regime of *Plessy v. Ferguson*.[121] To this extent, impairment of the values of equality and of the image of justice are both unavoidably associated with any departure from precedent.

Prospective limitation of the new rule can, in some circumstances, reduce the impairment of some of these values, and thereby justify over-

119. 316 U.S. 455 (1942), overruled in Gideon v. Wainright, 372 U.S. 335 (1963).

120. 338 U.S. 25 (1949), overruled in Mapp v. Ohio, 367 U.S. 643 (1961).

121. 163 U.S. 537 (1896), overruled in effect in Brown v. Board of Educ., 347 U.S. 483 (1954).

ruling in circumstances that otherwise would not justify it. Thus self-correction of judge-made law is facilitated. But the impact of prospective limitation upon the five values at stake is differentiated. It is the thesis of this Article that, having decided to make a change, to overrule, in the face of these values, a court should continue to bear them in mind when deciding what effect to give the overruling decision. While all five tend to line up on the side of stare decisis, different values wind up on different sides of the next question, whether to overrule prospectively or retroactively, depending on the nature of the case. Also, in concrete cases, the five values have unequal weight, depending on the circumstances and subject-matter of the particular case.

One can generalize to the extent of saying that prospective limitation normally minimizes or eliminates impairment of the values of stability and reliance, has a varying impact on impairment of the value of efficiency in judicial administration, and (in many cases, at least) significantly increases impairment of the values of equality and the image of justice.

Stability is served by prospective limitation of a departure from precedent because a change in the legal rules affecting a social institution has less traumatic and disturbing effects upon the institution if a conscious adaptation of the institution to the new legal regime is made possible. Retroactive application of the new rule creates an interregnum during which social relations have been conducted within institutional arrangements subsequently determined to be legally vulnerable. Prospective limitation of the new rule can postpone the new regime and thereby permit conscious adaptation of the institution in sufficient time to avoid such an interregnum.

Reliance is similarly protected by prospective limitation, even though there may be no institutional interest demanding stability.

Prospective limitation of a newly announced rule tends both to promote and retard judicial efficiency. It is somewhat inconvenient in that judges will be called upon to apply two rules for a time, instead of one; but the wheels of justice are not apt to grind to a halt just because a few more rules are thrown into the works. This mild inconvenience is probably more than compensated by the advantage of not having to apply a new rule in the midst of trials or on appeal—an advantage that would accrue if the new rule were only to apply to causes of action that arose after its issuance.

Of course, the real worry, as far as judicial administration is con-

cerned, is in the criminal law area. While the system may be able to take on a few hundred new rules without a murmur, the wheels might slow perceptibly under the burden of too many thousands of full blown habeas corpus hearings and new trials. This problem is considered separately in Part IV.

The value of equality is, of course, unavoidably impaired to some extent whenever precedent is rejected. But prospective limitation of the new rule significantly increases the impairment. When a new rule is applied retroactively, all courts at any given time apply what they perceive to be the law without unjustified discrimination to all persons who come before them. And, both before and after the overruling decision, all litigants have their disputes resolved in accordance with what is then regarded as the proper rule of law. Prospective limitation, on the other hand, requires a court simultaneously to apply different rules—one of them presently acknowledged to be "wrong" in at least some types of cases[122]—to persons whose situations may be indistinguishable on any relevant basis.

The image of justice does not always suffer because precedent is overruled, even though that entails some impairment of the value of equality. Sometimes other ingredients of justice, and the image of justice, are so importantly involved that overruling does more good than harm to this value. But the impairment of equality inherent in any overruling decision, considered in isolation, always leaves scars on the image of justice. And the scars inflicted by overruling are always deeper and more extensive if the overruling is denied retroactive application, and the impairment of equality thus more pronounced.

122. I am thinking here of cases in which the new rule involves a moral or ethical judgment, and of cases in which the court intended to adhere to precedent, or to correct past error, rather than to engage in a creative law-making function. It is important here that the factual premise of the argument for the prospective limitation approach—that courts do make law—should not be mistaken for more than it is. If courts always made law, a case could be made for a general rule depriving all judicial decisions of retroactive effect, and a technique would become unnecessary. In the vast majority of cases, however, even supreme tribunals purport merely to apply pre-existing law to the facts as found. In the absence of unusually tortured distinctions of precedent, it ought not to be assumed that the courts in such cases are not doing what they purport to be doing. As one author said thirty years ago, "retroactive operation of decisions is inherent in the common-law system." Note, 47 HARV. L. REV. 1403 (1934). Although developing legal theory has rejected the inherent necessity of retroactive application, this background is not so easily disposed of. And in the rendition of countless appellate decisions, whether they apply, elaborate, augment, alter, or reject previously announced doctrine, I think the appellate court intends to declare rather than change the law. If precedent is rejected, it is more

This should be sufficient to demonstrate the differences in the impact of prospective limitation upon the values that are at stake. It is necessary, however, to distinguish also the various concrete situations in which the question of retroactive application must be decided. Prospective limitation has generally recommended itself to the courts in situations where the values of stability or reliance or both of them have been dominant and those of equality and the image of justice either not seriously impaired or relatively less important. Generally, the value of judicial efficiency has been only indifferently affected by prospective limitation; it has assumed importance only in res judicata[123] and habeas corpus cases.[124]

Despite this generalization as to the impact of prospective limitation upon the various values, they can be balanced only in a specific context since different values are differently affected and entitled to different weight in various types of cases. Thus a change in property law fairly cries out for prospective overruling. This is so first because of the obviously great societal interest in stability in this area, in land titles, for instance. Reliance too is a particularly strong value here. In property transactions, unlike tort situations, men tend consciously to rely on existing law. To disappoint expectations reasonably based on such deliberate reliance would clearly be unsound. On the other hand, though prospective limitation of an overruling decision in the property field applies different rules to persons in somewhat similar situations, it impairs the values of equality and the image of justice only slightly. First, there is a rational basis for discriminating between persons who transferred or acquired property prior to the overruling decision and those who did so afterwards. Those who did so before might and ought to have expected that their transaction would be governed by the old rule, and this is not true of those who did so afterwards.

It is essentially this analysis, or perceived bits and pieces of it, that has led courts to limit overruling decisions to prospective effect in cases involving title to property,[125] questions of personal status involving

frequently than not because it is regarded has having been erroneous *ab initio*, rather than as having become unsound with the passage of time and social change. I do not here suggest that prospective limitation is inappropriate merely because the change recognizes past error; but it is important to observe that in such cases, retroactive application causes greater impairment of the value of equality than in other cases. And this is true also, of course, of the image of justice.

123. See notes 134-43 *infra* and accompanying text.

124. See Part IV *infra*.

125. See, e.g., Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952); Hanks v. McDanell, 307 Ky. 243, 210 S.W.2d 784 (1948). "The cautionary rule

the family,[126] and commercial transactions[127] precisely because it is usual for persons entering into transactions in these areas consciously to rely on, or at lease act in cognizance of, current law. Only a man who fails to ascertain the current rule, or one who has consented to its application, will be harmed; and it is reasonable to discriminate against him on the basis of his failure or consent. It is also important to note that the rules involved here are not apt to have any ethical content. Hopefully a new rule will be better, more efficient than the old, but it is not apt to be seen as "right" in the sense that makes us want to universalize it.

For purposes of illustration, this analysis may be applied to a hypothetical based on the old bond cases.[128] Suppose that bonds have been held first to have been validly issued and then, in an overruling decision, deemed invalid, and that bonds have been issued after both decisions. There is a broad institutional interest in the stability of government bonds, reinforced by the reliance of original purchasers who relied on the earlier decision; it was here that Mr. Justice Swayne declined to "immolate truth, justice and the law" by retroactive invalidation, even though a state statute was involved and a state court had "decreed the sacrifice."[129] How do equality and the image of justice fare upon prospective limitation in this situation? Because buyers in these situations are apt to act in conscious reliance on existing law, a change of law seems to be a sufficient relevant differentiating factor. While there may still be isolated pockets of widows and orphans, in these sophisticated times, who rely only on the elaborateness of the engraving on the certificate—persons as to whom the change of law is irrelevant—reliance is generally so important here that the mere opportunity to rely is a sufficient basis for discriminating between buyers.

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against overruling prior cases settling the rules of property . . . becomes eliminated when the overruling opinion reserves such rights by giving that opinion only prospective effect." *Id.* at 250, 210 S.W.2d at 788.

Some courts refuse to overrule at all in such cases on the ground that the changing of well-established rules of property is peculiarly within the province of the legislature. Nashville Trust Co. v. Tyne, 194 Tenn. 435, 250 S.W.2d 937 (1952); Fox v. Snow, 6 N.J. 12, 76 A.2d 877 (1950).

126. See, *e.g.*, Bingham v. Miller, 17 Ohio 445, 448-49 (1848); Note, 71 YALE L.J. 916-17 (1962).

127. See, *e.g.*, Sunburst Oil & Ref. Co. v. Great No. Ry., 91 Mont. 216, 7 P.2d 927, *aff'd*, 287 U.S. 358 (1932); Montana Horse Prods. Co. v. Great No. Ry., 91 Mont. 194, 7 P.2d 919 (1932).

128. *E.g.*, Douglass v. County of Pike, 101 U.S. 677 (1879); Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863). For a further discussion, see note 20 *supra* and accompanying text.

129. Gelpcke v. City of Dubuque, *supra* note 128, at 206-07.

Also, the new rule will not embody ethical values so that unequal treatment will tend less to undermine the image of justice.

It is difficult to generalize, but reliance is apt to be less deliberate—and thus entitled to less weight—in tort situations. And there is at least a possibility—where tort law is still bound up with notions of culpability—that the new rule will embody ethical values so that equality will be more important. This points up what would appear generally to be true: that the values of reliance and equality tend to be inversely related. The greater the opportunity for and tendency toward reliance, the less basis is there for complaint that prospective overruling treats persons unequally.

The history of Anglo-American tort law has been largely that of retroactive judicial expansion of tort liability, without concern for the tortfeasor's reliance, ever since the action on the case was first recognized—retroactively—by the fiat of the judges.[130] The weightier interest here, at least by modern standards, seems to lie with the tort victim; his plight demands compensation, even at the expense of revising precedent, and the demand has traditionally been answered in a retroactive way. The fault concept of tort liability has generally left no room for reliance. More important, the courts need not go as far to protect such reliance as may exist in this area as in the property field, because here reliance, such as it is, is at best only one-sided, and to protect it requires denial of equality to tort claimants. It seems to be generally conceded that the answer to tort harm is not self-insurance;[131] therefore people do not generally order their affairs consciously with reference to the current rules governing possible tort recovery from others in the event of injury. Thus there is no rational basis for distinguishing between tort claimants injured before and after the overruling decision. Neither group should be expected to have done or failed to do anything in cognizance of the old rule or the new one. It would be unrealistic to distinguish between the two groups on a consensual basis, so prospective limitation of the new rule would aggravate the damage done to the values of equality and the image of justice by the overruling. Here the value of reliance is thrown into direct conflict with the values of equality and the image of justice, and neither prospective

130. Fifoot, History and Sources of the Common Law 74 (1949). Possibly the example chosen is not the best, in that there is an alternative school of thought that the case was derived from chapter 24 of the Statute of Westminster II, 1285, 13 Edw. 1, ch. 24. See Field & Kaplan, Materials on Civil Procedure 224 n.d (1953).

131. See Morris, Torts 246-53 (1953); Ehrenzweig, *Assurance Oblige*, 15 Law & Contemp. Prob. 445 (1950). *But see* Prosser, Torts 568-77 (3d ed. 1964).

limitation nor retroactive application will satisfactorily protect all the interests involved. But the courts—whether or not consciously determining that the reliance value is less important—seem to have reached the best result in retroactively applying new rules expanding tort liability.

It is interesting to note that the only tort cases where the prospective limitation technique has been widely used have involved decisions overruling or limiting a rule of charitable or governmental immunity from tort liability.[132] Deliberate reliance is certainly a possible factor in these cases, in that charities or public bodies may have failed to obtain liability insurance in reliance on the old rule, thus putting them in quite a different position from a tort defendant who is merely being held liable under factual circumstances that formerly would not have given rise to liability. Presumably, one who has not previously enjoyed immunity from all liability in tort can be expected to have insured against such liability, whether it be fixed under old or new law. For example, a manufacturer previously liable to consumers for injury caused by a negligently manufactured item will most likely not suffer by extension of his liability via abolition of the privity requirement in implied-warranty actions, for his existing products liability policy should cover the new risk.

Furthermore, although the reason for prospective limitation most generally assigned in the immunity cases is reliance on the part of the class whose immunity is being abolished,[133] it seems questionable whether the same result would be reached if the overruling courts did not feel there was involved an institutional interest in stability. After all—whatever may have been the historical origin of the sovereign immunity doctrine—the justification most often advanced for both governmental and charitable immunity is the interest of society in protecting public funds and charitable funds from diversion to purposes other than those for which they were created. Prospective limitation, by affording an opportunity to secure insurance, minimizes the injury wrought to this societal interest by abolition of immunity, an injury which, at least in the case of many charities, would otherwise be severe. The injury

132. The governmental immunity cases are discussed in text accompanying notes 34-41 *supra*. Examples of the utilization of prospective limitation in overruling the doctrine of charitable immunity from tort liability are Kojis v. Doctors Hosp., 12 Wis. 2d 367, 107 N.W.2d 131, 292 (1961); Parker v. Port Huron Hosp., 361 Mich. 1, 28, 105 N.W.2d 1, 14-15 (1960).

133. See, *e.g.*, Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 28-29, 163 N.E.2d 89, 97-98 (1959), *cert. denied*, 362 U.S. 968 (1960), quoted on this point in text accompanying note 34 *supra*.

caused to public bodies would not seem to be so drastic, for the resources available to them are generally greater, and they have more control over their future revenues. Moreover, even if a particular judgment should be in fact oppressive, as in the case of a small, poor school district, the body subjected to liability could present a compelling case for financial relief to the legislature. Of course, the large charitable foundations are also unlikely to suffer irreparable injury from the necessity of satisfying a tort judgment, but many of their smaller brethren could well be bankrupted by claims arising out of one disaster.

A somewhat different alignment of values justifies the conclusion that retroactive application of an overruling decision should be denied when, in a civil case, the earlier transaction has reached the stage of judicial finality under the doctrine of res judicata.[134] Judicial efficiency would certainly be impaired, and perhaps gravely so, by retroactive application of the new rule to cases already finally adjudicated. Since a final judgment may be translative of title, or form the subject matter of commercial dealings, there are institutional demands for its stability, and there may be individual reliance upon it, as in the case of rules of property or of contract law.

Equality and the image of justice are impaired to some extent by refusal to give retroactive application to the newly announced rule, but this is ameliorated by the consideration that the final judgment itself provides some basis for distinguishing between those who have litigated, to whom the old rule remains controlling, and those who have not, and are permitted to invoke the new rule. But the distinction is a procedural one, and not entirely satisfying; the values of equality and the image of justice have induced some malaise or queasiness when res judicata has triumphed over a subsequently announced rule, and especially so when the new rule has an ethical content, and thus asserts a claim to universal applicability. It may not be too much to suggest that the dynamic expansion of the scope of habeas corpus,[135] at the expense of judicial finality in the criminal field, is at least in part attributable to the ethical quality of concepts such as due process and fairness of trial.

Even in civil cases, and with regard to newly announced rules having little or no ethical content, the values of equality and the image of justice have competed fairly vigorously with the doctrine of judicial finality. Courts are reluctant, for example, to sustain a plea of collateral

134. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

135. See Part IV *infra*.

estoppel[136] after an intervening rejection or revision of a controlling precedent. In some cases, of course, a plea of collateral estoppel will relate to a transaction that occurred after the overruling decision, but in others, the transaction will have intervened, so that collateral estoppel is competing with retroactive application of the new rule. The American Law Institute's *Restatement of the Law of Judgments* would apply the new rule retroactively here, "except where both causes of action arose out of the same subject matter or transaction; and in any event . . . if injustice would result" [137] from applying the old rule embodied in the prior adjudication urged as conclusive. No one, of course, has been able to capture the precise meaning of the "injustice" phraseology; if injustice means simply a denial of equality, retroactive application would always be required. While the *Restatement* clearly contemplates something less than this, courts have recognized that equality, at least in some cases, requires rejection of collateral estoppel, and that intervening as well as later transactions be governed by the new rule. Thus collateral estoppel is rejected after the intervention of an overruling decision, or even an appreciable change in the "legal atmosphere" resulting from a decision that does not overrule, in federal tax litigation,[138] customs litigation,[139] and other areas where one of the litigants is a member of an easily discernible class currently competing for survival in the new legal environment.[140] A final judgment holding, for example, that income during 1929-1931 under a term assignment of a royalty contract is not taxable to Mr. Sunnen survives the arrival on the scene, by judicial decision in 1940, of the *Clifford-Horst*[141] doctrine, under the rule of res judicata. But tax liability for income under the same assignment during the year 1937 is imposed retroactively on Mr.

136. I am using Professor Austin Scott's and the Restatement's phrase to refer to the doctrine that a final judgment is conclusive between the parties and their privies of material issues that were litigated and adjudicated in other litigation between them not involving the same cause of action, but involving a common issue. See RESTATEMENT, JUDGMENTS § 68 (1942); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942).

137. RESTATEMENT, JUDGMENTS § 70 (1942).

138. Commissioner v. Sunnen, 333 U.S. 591, 599-607 (1948); Bush v. Commissioner, 175 F.2d 391 (2d Cir. 1949).

139. United States v. Stone & Downer Co., 274 U.S. 225 (1927); United States v. Boone, 188 F.2d 808 (C.C.P.A. 1951).

140. *E.g.*, Grandview Dairy, Inc. v. Jones, 157 F.2d 5 (2d Cir.), *cert. denied*, 329 U.S. 787 (1946) (involving statutory classification of a milk products plant for milk supply regulation purposes).

141. Helvering v. Horst, 311 U.S. 112 (1940); Helvering v. Clifford, 309 U.S. 331 (1940).

Sunnen under the *Clifford-Horst* doctrine,[142] although in the absence of the 1940 change of decisional law, he would be protected by the collateral estoppel effect of the earlier judgment. The explanation appears to lie in the idea that Mr. Sunnen must be treated equally with taxpayers similarly situated, and the conclusive effect of the earlier judgment therefore should be limited narrowly to the cause of action adjudged. It has been suggested that collateral estoppel should never apply after an intervening change of law.[143]

Mention of the retroactive impact of the *Clifford-Horst* doctrine suggests one other area in which prospective limitation has sometimes seemed appropriate, apparently because of prevalence of the value of reliance, but perhaps also in recognition of an institutional demand for a new kind of stability to facilitate commercial transactions. Mr. Sunnen, we may hope, was not detrimentally affected by his reliance on the tax law obtaining prior to *Helvering v. Clifford*[144] and *Helvering v. Horst*;[145] his term assignment was to his wife, and those decisions perhaps merely undid, for tax purposes, what Mr. Sunnen hopefully thought he had accomplished. But increasingly large and complex business transactions are built around predicted application of tax law. Many such transactions, I think it is safe to say, would take entirely different forms, or be scotched completely, but for their anticipated tax consequences. Transfers of immense mineral properties in the oil and gas industry, for an instance, frequently would not take place but for the tax treatment of the "ABC" transaction, affording long-term capital gain taxation to the vendor, and avoidance of income tax liability to the vendee on a significant proportion of the income from the property that is devoted, in effect, to paying the unpaid balance of the purchase price.[146] Reliance on announced law is here present in its most full-blown form, and this is recognized by the Internal Revenue

142. Commissioner v. Sunnen, 333 U.S. 591 (1948).

143. Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 Iowa L. Rev. 217, 240-41 (1954). Another and, I think, preferable position is that "a judgment should have collateral estoppel effect as to causes of action that existed at the time of its rendition, but its *prospective* effect as collateral estoppel, in suits on subsequently arising claims, should not be extended beyond a change in the applicable law." 1B Moore, Federal Practice ¶ 0.448, at 4241 (2d ed. 1965).

144. 309 U.S. 331 (1940).

145. 311 U.S. 112 (1940).

146. See Appleman, *The ABC Deal*, 11 Institute on Oil & Gas Taxation 519 (1960); Benjamin & Currier, *The Supreme Court and Taxation of Oil, Gas, and Production Payments: The Lake Cases*, 19 La. L. Rev. 579 (1959); Galvin, *The "Ought" and "Is" of Oil-and-Gas Taxation*, 73 Harv. L. Rev. 1441 (1960).

Service's current practice of giving advance determinations of the taxability of such transactions, upon application from the interested persons.[147] For the same reason, protection of reliance strongly demands that any overruling decision affecting such planned transactions (or transactions of types that are likely to be tax-planned) be denied retroactive application, at least as to them. Actual reliance, or the great likelihood of it, appears to be a sufficient differentiating factor to justify discrimination between transactions that do and those that do not reflect reliance. Consider, for example, the difference between the planned property transfer just described as to which denial of retroactive application may seem the best result,[148] and the transfer of property (if we may call it that) by embezzlement in *James v. United States*.[149] In *James*, the Court overruled *Commissioner v. Wilcox*[150] to hold that the proceeds of embezzlement are taxable income to the embezzler in the year of the embezzlement, but reversed a conviction of James for willful failure to report income. James was saved by a combination of three Justices who thought the *Wilcox* case should have been adhered to and three other Justices who thought, in effect, that the new rule should not be applied retroactively in a criminal prosecution.[151] While there is language in *James* suggesting that the embezzler there had relied on *Commissioner v. Wilcox* in failing to report income in the year of the embezzlement,[152] it seems clear that the embezzlement itself

147. The widespread practice of issuing rulings on the tax impact of prospective transactions is closely regulated, see generally 26 C.F.R. § 601.201 (Supp. 1964). There appears to be no clear statutory authority for the issuance of such rulings, though some support for the practice can be found in INT. REV. CODE OF 1954, § 7805(b), which authorizes the issuance of rulings that have no retroactive effect. See Yager, *When and How Should the Practitioner Ask for Rulings and Technical Advice?*, 14 J. TAXATION 38-39 (1961).

148. Arizona State Tax Comm'n v. Ensign, 75 Ariz. 376, 257 P.2d 392 (1953); Duhame v. State Tax Comm'n, 65 Ariz. 268, 179 P.2d 252 (1947); *cf.* German Gymnastic Ass'n v. City of Louisville, 306 Ky. 810, 209 S.W.2d 75 (1948) (decision denying tax exemption not retroactive, because of reliance on prior judicial determination); Board of Equalization v. Tulsa Pythian Benevolent Ass'n, 195 Okla. 458, 158 P.2d 904 (1945); Gibson v. Phillips Univ., 195 Okla. 456, 158 P.2d 901 (1945).

For a particularly hard case in which the court refused to protect the taxpayer's reliance interest by prospective limitation, see People *ex rel.* Rice v. Graves, 242 App. Div. 128, 273 N.Y. Supp. 582 (3d Dep't 1934), *aff'd mem.*, 270 N.Y. 498, 200 N.E. 288, *cert. denied*, 298 U.S. 683 (1936).

149. 366 U.S. 213 (1961), also discussed in text accompanying notes 170-74 *infra*.

150. 327 U.S. 404 (1946).

151. See Part IV *infra*.

152. 366 U.S. 213, 221-22 (opinion of Warren, C.J.); *id.* at 245 (Harlan, J., concurring).

was not a tax-planned transaction; James and others like him may be surprisingly knowledgeable about the criminal law, but below the Al Capone echelon generally are not closely conversant with tax law. Civil tax liability, it seems certain, might be retroactively imposed by the *James* decision upon the proceeds of earlier embezzlements without any disturbing injury to the values of stability and reliance. In *James* itself, despite discussion in terms of reliance by various members of the Court, denial of retroactive application seems to have resulted from a different consideration, applicable only to criminal cases, as I will attempt to show in Part IV.

I would like to conclude this somewhat random discussion of the values to be weighed in deciding whether a decision should be given only prospective effect by considering a pair of United States Supreme Court cases that announced "new" rules, but were cases of first impression rather than overruling decisions. Prospective limitation was suggested in one, *Mosser v. Darrow*,[153] and granted in the other, *England v. Louisiana State Board of Medical Examiners*.[154] The cases are interesting not only because they are among the few Supreme Court cases dealing with retroactivity but also because they raise a new problem: Is prospective limitation proper in non overruling cases and, if so, in which ones? The problem is, of course, that almost every law suit involves some slight departure from, or extension, or at least modulation, of old law. And in a multitude of cases one party will have erroneously relied on his view of existing law, a reliance which will be undercut when his opponent's version of the law is applied to the loser's case. It seems clear that in the normal course such reliance should not warrant prospective limitation. Absent a departure from old law so surprising as to be tantamount to an overruling, or absent an extraordinary interest in stability or reliance, non overruling decisions should be given retroactive effect. The business of the courts, after all, is primarily to dispose of controversies, not to legislate prospectively on a multitude of specific issues, many of which will never come up again. Consider, in this context, the *Mosser* and *England* cases.

In *Mosser*, the Court announced and imposed for the first time a rule of substantive liability upon a reorganization trustee for profits he had innocently permitted corporate employees to make by trading in securities of the corporation in reorganization. Mr. Justice Black un-

153. 341 U.S. 267, 275 (1951) (Black, J., dissenting).

154. 375 U.S. 411 (1964).

successfully contended that prospective limitation was in order.[155] The case was one in which it seems that the principal value demanding prospective limitation was protection of reliance; the trustee might reasonably have perceived and in fact apparently did perceive that his conduct was in accordance with what the law required. He was disappointed. But a line must be drawn somewhere; almost every law suit suggests that someone has misapprehended what the law required him to do or not to do. Rather than impair the values of equality and the image of justice, it seems to have been a preferable choice to subject Mr. Darrow to what Mr. Justice Cardozo called the risks inherent in the game of life.[156]

There was not the special interest in reliance or even the "constructive reliance" that may be said to exist in cases imposing a contemporaneously announced criminal liability, nor was there any extraordinary interest in stability. While Mr. Justice Black did not mention it, it might be urged that there is a special interest in stability here, in that the trustee is a court-appointed official carrying out a quasi-public duty. Thus there is at least a degree of interest in protecting his reliance so that capable men will continue to undertake such duties and the stability of court-supervised reorganization proceedings be fostered.[157] However, the majority felt that there were other and adequate ways in which the trustee could protect himself and proceeded to impose a hefty $43,000 surcharge on him even though his error was innocent, and even though he derived no benefit from the improper transaction.

In the *England* case,[158] the Court announced a rule that, in an abstention case, a state court's judgment deciding a controlling federal question bars relitigation of that question in the federal district court, unless a party has preserved the question by expressly reserving it in the court. However, the plaintiffs in *England*, reasonably though erroneously

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155. Mr. Justice Black saw possible virtues in the new rule, but felt:

> [T]here is no reason why the rule should be retroactively applied to this respondent when to do so is grossly unfair. Admittedly, the most that can be said against respondent is that he made an honest mistake which before today would not have subjected him to the heavy financial penalty. Under these circumstances, if the new rule is to be announced by the Court, I think it should be given prospective application only.

341 U.S. at 276.

156. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 148 (1921).

157. If *Mosser v. Darrow* had been an overruling decision, imposition of liability would have been quite closely analogous to the problem posed by retroactive imposition of civil liability upon a public official for acts done in this official capacity, discussed in text accompanying notes 91-96 *supra*.

158. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

relying upon a distinguishable Supreme Court decision,[159] had presented and litigated the federal question in state court, so the new rule was not applied to them. The Court was impressed by the fact that numerous legal writers as well as the court below and the plaintiffs had read the previous Supreme Court decision as *compelling* parties to litigate federal issues in the state court, while in fact the Supreme Court had only meant to require that the parties indicate the federal issues so that state courts might settle state questions in the light of the pending federal issues. Only one commentator had guessed right as to the meaning of the prior decision.[160] Presumably the Court felt that this was one of the rare situations in which a new rule makes a sufficiently unforeseeable departure from existing law to warrant prospective limitation. It should be pointed out also that prospective limitation cost the opposing party only time and a procedural defense; while retroactive application would have cost plaintiffs the case, and deprived them of a federal trial, a statutory right that the new rule was intended to preserve for those who wished to have it.[161] In these circumstances, the competing values of equality and the image of justice were hardly impaired by giving the plaintiffs their day in federal court.

IV. Retroactivity, Criminal Law, Due Process, and Habeas Corpus

As is appropriate in a nation that sets the highest store by individual life and freedom, we have always in this country treated the imposition of criminal sanctions with considerable care. The preservation of individual life and individual freedom is one of the fundamental objects—perhaps the ultimate object—of our mode of government. And this continues to be true, for all that our frontiers are behind us and for all that ours is now a massive industrial society, intricately and increasingly interdependent. These values persist. And it is fitting that a society which stakes so much on individual worth should approach the taking of one man's freedom with extraordinary, indeed with ritual care, for in this country as in no other it should be and is a solemn undertaking. There is no need to catalogue the incidence of this concern in the Constitution, no need to recapitulate recent Supreme

159. Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364 (1957).

160. See Note, 73 Harv. L. Rev. 1358, 1364-65 (1960).

161. Under the *England* rule, the party given a right to a federal trial may preserve it even in an abstention case, as to federal issues, by expressly reserving it in state court. 375 U.S. at 421.

Court decisions reflecting our still growing concern with personal liberties.

To a nation with this wholesome preoccupation, the mere expression and publication of criminal laws require careful handling. (I have reference to the high requirements of clarity in drafting criminal laws,[162] the void-for-vagueness doctrine,[163] and the requirement that the possibility of certain things being criminal be reasonably foreseeable.[164]) *Changes* in the criminal law pose problems of the greatest delicacy. However remote the danger of abuse in fact at this time, a change of criminal law has a potential for evil—for legislative elimination of individual rivals or factions by passage of retroactive criminal statutes—which would undercut our basic institutions, or indeed any possibility of limited government.[165] The founding fathers addressed themselves

162. See notes 174-78 *infra*, for a few examples.

163. See, *e.g.*, Kunz v. New York, 340 U.S. 290 (1951); Herndon v. Lowry, 301 U.S. 242 (1937); Note, *The Void for Vagueness Doctrine*, 109 U. PA. L. REV. 67 (1960), in SELECTED ESSAYS ON CONSTITUTIONAL LAW 560 (1963). It is worth noting that most of the void-for-vagueness cases involve criminal statutes that arguably outlaw conduct protected by the first amendment; in their common tendency to curb governmental suppression of the opposition, the void-for-vagueness doctrine and the prohibition of ex post facto legislation are closely related.

164. See Lambert v. California, 355 U.S. 225 (1957) (ordinance penalizing failure to register as a convicted felon, without element of willfulness, held unconstitutional), 56 MICH. L. REV. 1008 (1958); *cf.* Smith v. California, 361 U.S. 147 (1959) (ordinance penalizing booksellers whether they knew contents of books or not held unconstitutional).

165. See HART, THE CONCEPT OF LAW 202 (1961):

> [A] minimum of justice is necessarily realized wherever human behavior is controlled by general rules publicly announced and judicially applied. . . .
>
> Further aspects of this minimum form of justice which might well be called "natural" emerge if we study what is in fact involved in any method of social control, . . . which consists primarily of general standards of conduct communicated to classes of persons, who are then expected to understand and conform to the rules without further official direction. If social control of this sort is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be. This means that, for the most part, those who are eventually punished for breach of the rules will have had the ability and opportunity to obey.

It should be mentioned that Professor Hart's general view does not extend to certain Nazi criminal statutes and decisions for reasons which are discussed in Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 618-19 (1958). See also HART, *op. cit. supra* at 254-55 for Professor Hart's "corrected account" on this matter.

For a more sweeping view of the need to limit retroactivity, see Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 651 (1958): "A general increase in the resort to statutes curative of past legal irregularities represents a deterioration in that form of legal morality without which law itself cannot exist. The threat of such statutes hangs over the whole legal system, and robs every law on the books of some of its significance."

to the danger in forbidding ex post facto legislation,[166] but did not impose similar limits on the courts. In this generation we have not only seen ex post facto legislation used to newly monstrous effect,[167] but we have seen that courts as well as legislatures are to be feared in this regard.[168] The United States Supreme Court has not lately taken up the problem of retroactive judicial changes, although such changes have been upheld in the past,[169] perhaps because the declaratory view of decision-making was controlling at that time.

That there are special problems about the retroactive application of a change which *expands* criminal responsibility is fairly obvious. That there are similar problems about failure to give retroactive effect to changes which limit criminal responsibility is less obvious, but, I think, equally true.

As to judicial changes which expand the substantive criminal law, the values seem to line up on the side of prospective limitation, but to be overshadowed by the principle prohibiting ex post facto criminal law-making, which demands the same result in any event. Stability, here as in other areas, would be impaired to the extent that social institutions are involved. Reliance on the old law, where it exists, would be disappointed in the most devastating way by retroactive application, although this is not an area where people are apt to have acted in reliance on perceived law. Judicial efficiency is fostered by prospective

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166. U.S. CONST., art. I, § 10.

167. The history of the Nazi Germany provides a stark example in Hitler's "Roehm Purge" of 1934. After this slaughter of over one hundred persons, the puppet cabinet "legalized" the action as a measure necessary for the defense of the state. Two weeks after the purge, Hitler told the Reichstag: "If anyone reproaches me and asks why I did not resort to the regular courts of justice, then all I can say is this: In this hour I was responsible for the fate of the German people, and thereby I became the supreme judge of the German People." FULLER, THE MORALITY OF LAW 54-55 (1964); see SHIRER, THE RISE AND FALL OF THE THIRD REICH 225-26 (1959).

The Chinese have also retroactively legitimated the slaughter of vast numbers of middle-class landowners by the simple expedient of outlawing them: "In late 1952 Communist Minister of Finance Po I-po publicly admitted that the Reds had liquidated 2,000,000 'bandits' in the preceding three years. Some Western experts calculate that 14 million Chinese were executed during the land reform of 1951 alone." Time, Dec. 1, 1958, p. 22, col. 3.

168. See SHIRER, *op. cit. supra* note 167, at 268-70.

169. Frank v. Mangum, 237 U.S. 309 (1915); *cf.* Ross v. Oregon, 227 U.S. 150 (1913) (decision in case of first impression). Compare Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924) (retroactive overruling decision did not violate contracts clause). *But see* Douglass v. County of Pike, 101 U.S. 677, 687 (1880) (dictum). For further comment on *Mangum*, see note 12 *supra*.

limitation, in the rather minimal sense that old activities will not be brought before the courts. Equality may be impaired, in that persons who did the same acts before and after the overruling decision—who may have been equally ignorant of it in fact—are treated differently; but the one who acted later is properly differentiated, if one does not boggle at the maxim that ignorance of the law does not excuse, because he had the opportunity to know that his conduct would be criminal. Finally, the image of justice quite obviously will not tolerate retroactive application of criminal responsibility, for the same reason that the ex post facto principle will not.

Not many examples of overruling decisions expanding criminal responsibility come to mind; most that do involve the reinterpretation of statutes. We tend to be somewhat more Blackstonian in interpreting statutes, as opposed to the common law or constitutions, for the statute is "there" in a way that the "brooding omnipresence" is not. Still, courts do "make" statutory law, clearly enough, and should not fasten on the old conceptualism to leave the way open for immense wrongs, however remote the present risk.

Supposing a situation in which a court is trying to update a common law crime, rather than a statute, to meet changed circumstances, prospective limitation is still in order. For one thing, it is difficult to believe that, all these millenia after our fall from grace, the criminal mind will concoct some new wrong which will call for retroactive application of new laws. Society and malefactors have been at the ancient game too long for such a situation to arise.

In the *James* case,[170] discussed above,[171] the Court did in effect limit a judicial broadening of the substantive criminal law to prospective effect, but the Justices who wanted to do so put most of their emphasis on reliance. While the result seems altogether correct, that emphasis seems somewhat misplaced. In *James*, the Court overruled *Commissioner v. Wilcox*[172] to hold that embezzled money is taxable as income in the year of embezzlement; presumably because *James* was a criminal prosecution (for willful failure to report income), a majority of the Court was unwilling to apply the new rule retroactively.[173] Mr. Chief

170. 366 U.S. 213 (1961).

171. See notes 103-07 *supra* and accompanying text.

172. 327 U.S. 404 (1946).

173. The breakdown was as follows: Chief Justice Warren, joined by Justices Brennan and Stewart, thought *Wilcox* should be overruled, but voted to reverse James' conviction because "the element of willfulness could not be proven in a criminal

Justice Warren, in urging this result, suggested the possibility that James had failed to report embezzled money as income in reliance on the *Wilcox* decision. Justices Harlan and Frankfurter would have remanded for a new trial to see if this was so, suggesting that it would be proper to convict James of willful failure to report income if it turned out that he had not relied on the *Wilcox* decision.[174] Yet it seems quite likely that a new trial for this purpose would have been ceremonial only, that even in the unlikely event James had ever heard of the *Wilcox* decision, his failure to report the fruits of his crime to federal tax authorities probably resulted from his fear that this would lead to conviction for embezzlement. Of course, if a person does in fact act in reliance upon contemporaneous law legitimating certain conduct, the strongest kind of case can be made out for protecting such reliance. All I mean to say is that, since ignorance of the criminal law is no defense, and since such ignorance is common, reliance alone is not adequate to explain the *James* decision, or even the ex post facto clause itself.

In the converse situation, where an overruling decision narrows the substantive criminal law—either by ruling that certain conduct is not covered by a statute[175] or that a statute is unconstitutional[176]—I believe that retroactive application is appropriate. At first blush this may seem to be inconsistent with the preceding section, a "heads I win, tails

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prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by *Wilcox* at the time the alleged crime was committed." 366 U.S. 213, 221-22. Justices Black and Douglas would have retained *Wilcox*, and voted to reverse on that basis. They further objected to the "prospective way" in which *Wilcox* was overruled. *Id.* at 223. Justice Whittaker substantially agreed with them, in a separate opinion. *Id.* at 248. Justices Harlan and Frankfurter agreed in the overruling of *Wilcox*, but would have remanded for new trial to determine whether James had relied on *Wilcox* and thus, whether the element of "willfulness" was present. *Id.* at 241. Justice Clark favored overruling *Wilcox* and affirming the conviction. *Id.* at 241.

174. *Id.* at 241.

175. In two cases of this kind, the Court of Appeals for the District of Columbia imposed limitation to prospective effect. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954) (adopting narrower view of criminal responsibility and applying it to reverse Durham's conviction, but otherwise limiting it to prospective effect); Warring v. Colpoys, 122 F.2d 642 (D.C. Cir.), *cert. denied*, 314 U.S. 678 (1941). In *Warring*, the court refused to apply a narrower construction of a criminal contempt statute, adopted in Nye v. United States, 313 U.S. 33 (1941), to conduct that occurred before *Nye*, under the regime of Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).

176. Retroactive application has generally been given in this situation. See Partain v. State, 77 Okla. Crim. 270, 141 P.2d 124 (1943); Hawaii v. Merseberg, 35 Hawaii 248 (1939); Note, 60 HARV. L. REV. 437, 446 (1947); *cf.* Hamm v. City of Rock Hill, 379 U.S. 306 (1964).

you lose" proposition whereby the criminal always goes free and society always takes a risk. I suggest, however, that this result will be shown to be correct by a consideration of the dominant relevant values.

Equality and the image of justice are the values that most obviously assert themselves in this situation. The conduct involved may or may not have been morally reprehensible, but as a matter of record society has not in fact prescribed criminal punishment for it, or society was constitutionally powerless to do so, or at least to do so in the particular way attempted. If the overruling decision is based on constitutional grounds—that the statute invades freedom of speech or association, for example—the decision is apt to invoke an ethical judgment, and thus, as has been suggested, is apt to have a special claim to universal applicability.[177] Even if it does not, the overruling decision will very likely be conceived as an admission of past error, rather than a creative exercise of the judicial function to accommodate changed social conditions.[178] The overruling court will normally be saying that the statute never meant what the old precedent took to be its meaning, or that, despite the earlier decision, it has since become clear that the legislature did not, from the beginning, have constitutional power to enact the statute that it did.[179] In these situations equality insists that present and past conduct be treated alike; to imprison, or possibly to execute, a person for having engaged in conduct presently acknowledged to have been innocent in the doing (despite any intent to violate the statute) is unconscionable.

On the other side, the values that are most clearly damaged by retroactive application in this situation are protection of reliance—taken in the very broad sense of encouraging obedience, and therefore discouraging disobedience, of law as contemporaneously announced[180]—and stability. Our protagonist is, after all, a criminal in spirit in that, whether through ignorance or hardened disregard, he flouted what then appeared to be the law, and only rarely will he have done so to raise a

177. See note 118 *supra* and accompanying text.

178. Thus the rationale of a narrower test of criminal responsibility would seem to lie in recognition of newly discovered psychological insights, rather than an evolving acceptance of criminal conduct caused by "irresistable impulse." See Durham v. United States, 214 F.2d 862, 869-74 (D.C. Cir. 1954).

179. This does not mean that the prospective limitation technique is irrelevant; it is a valuable instrument even in cases of this kind. See text accompanying note 146 *supra*. But the impairment of the values of equality and the image of justice is increased in such cases. See note 72 *supra*.

180. The value is not limited to encouragement of obedience, see note 62 *supra* and accompanying text, but this appears to be a major ingredient.

test case. Additionally, retroactive application of a decision upsetting a substantive criminal law creates an interregnum, a period during which social institutions responsible for public peace have operated on the assumption that the conduct in question had been validly outlawed. This may have forestalled other legislative efforts to control the same conduct. Finally, retroactive application of the new rule will increase the impairment that overruling causes to the efficiency of judicial administration, since the new rule will have to be applied to cases already in the channels of appellate review, and, if the law provides a post conviction remedy of sufficient flexibility,[181] past convictions will have to be reexamined.

Despite these considerations, the violations of the values of equality and the image of justice that would accompany prospective limitation in this situation are so harsh that I urge without hesitation that an overruling decision abrogating or contracting criminal responsibility ought to be given full retroactive sweep.[182]

It is necessary at this point to recognize that full retroactive sweep in criminal cases may be fuller than in civil cases because of limitations that have been imposed upon the finality of criminal judgments of conviction. It is established doctrine that an overruling decision does not deprive a civil judgment of its effect as res judicata,[183] even though the judgment was based upon the precedent subsequently overruled. Stability, judicial efficiency, and in some cases protection of reliance are the values that have prevailed, at some expense to the values of equality and the image of justice.[184] (The balance appears to be an uneasy one even in civil cases; it tends to go the other way when the collaterally conclusive effects of a civil judgment are in issue.[185]) Because of habeas corpus and similar writs, judicial finality in criminal cases is relegated to a much lower estate than in civil. A criminal judgment of conviction does not enjoy the same degree of finality until the convicted defendant has been executed, died in prison, or been released. And because of the possibility of subsequent reimprisonment under multiple offender laws, the judgment of conviction

181. At present, federal habeas corpus appears to require that the convictions have resulted from a denial of due process. See notes 187-88 *infra*.

182. *Contra*, Warring v. Colpoys, 122 F.2d 642 (D.C. Cir.), *cert. denied*, 314 U.S. 678 (1941); Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954) (dictum).

183. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

184. See text accompanying notes 128-29 *supra*.

185. See text accompanying notes 136-43 *supra*.

may ultimately be attacked by habeas corpus at some future time as long as the convicted defendant draws breath.[186]

The relevant ground for release under the federal habeas corpus statute is that the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." [187] It seems possible that the relative importance of the various values is somewhat different in the habeas corpus than in the appeal context. Assuming that habeas corpus is procedurally available,[188] I believe that the overruling decision should be given retroactive effect on habeas corpus, although the values so impaired are more prominently involved here than when retroactive application is sought by appeal. Equality and the image of justice both demand just as vehemently that the prisoner be released; that his conviction became final before the overruling decision is, from the prisoner's point of view, no more a relevant differentiating factor than that the conduct for which he is being punished was committed before the same

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186. See U.S. *ex rel.* Durocher v. LaVallee, 330 F.2d 303 (2d Cir.), *cert. denied*, 377 U.S. 998 (1964).

187. 28 U.S.C. § 2241 (c)(3) (1958).

188. If release is sought by a prisoner in federal custody, it appears that retroactive application of the new precedent would fall within the statute. As a matter of semantics, he is being held in custody in violation of the "laws" of the United States if the overruling decision reinterprets the criminal statute to exclude the conduct that the prisoner was convicted of having committed. If the overruling decision held the statute unconstitutional, the prisoner is being held in custody "in violation of the Constitution." If a state statute or constitutional provision provides for release under habeas corpus when a prisoner is held in custody under similar conditions with regard to the state's constitution or laws, it would appear that state habeas corpus would have the same scope, whether the overruling decision reinterpreted the statute, held it to violate the state constitution, or (because of the supremacy clause) held that the state statute violated the federal constitution or federal treaties or laws.

Whether federal habeas corpus would be available for release of prisoners in state custody in all of these situations is a more difficult question. If the overruling decision held the criminal statute was in violation of the federal constitution or federal treaties or laws, it seems clear that the federal writ should issue, in light of the supremacy clause. If, however, the overruling decision imposes a narrower interpretation upon the criminal statute, or holds it invalid because in conflict with the state constitution or repealed by other state legislation, I am not at all sure that the prisoner's continued detention is remediable by federal habeas corpus. In civil cases, at least, Great No. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932), held that the fourteenth amendment due process clause does not compel a state to give retroactive effect to her own judicial departures from precedent. Here, as in *Sunburst*, it appears that the law involved is all state, unless it can be successfully urged that fourteenth amendment due process or equal protection tolerate the thoroughly reasonable discrimination made in *Sunburst* but do not tolerate the similar (albeit less rational) differentiation made by prospective limitation of an overruling decision narrowing criminal responsibility under state law.

overruling decision. In either event, he is being punished for conduct now regarded as never having been validly denounced as a crime.

The values of stability, protection of reliance upon contemporaneously announced law, and judicial efficiency all make claims of some sort that overruling decisions narrowing criminal liability be denied retroactive effect in habeas corpus proceedings. This is also true of overruling decisions expanding the scope of due process as a protection to persons accused of crime, a situation subsequently discussed.[189] The involvement of these values in the context of criminal habeas corpus is, of course, clearly different from their involvement when the question is retroactive application of a new rule of property or contract law, or the like. The warden-prisoner relationship is a manifestation of a social institution, but it asserts a very different claim to stability than do the institutional arrangements of the family, land titles, commercial transactions, or other administrative governmental institutions. The institution is judicial, and that institution's claim to stability is normally manifest in the doctrine of res judicata. But the writ of habeas corpus suggests that the judicial institution's claim to stability is less in criminal than in civil cases, even though the writ primarily sanctions instability caused by known or knowable misapplications of law and denials of due process, and does not directly contemplate the retroactivity problem.

In any event, when the rule for which retroactive effect is sought is one establishing that the prisoner's conduct was not criminal, it is not at all clear that the impairment to stability is any greater in the habeas corpus context than it is in the context of an appeal, except for the difference in the number of cases affected. If the criminal statute has been declared invalid, or reinterpreted so that it clearly cannot cover the prisoner's conduct, it is difficult to see how the passage of time, or dissipation of evidence, will frustrate the judicial institution; since the prisoner ought never to have been prosecuted anyway, it does not seem to matter that he cannot be reprosecuted. The situation may not be so clear-cut, however. Quite possibly, the prisoner was found guilty by a general verdict in response to instructions that permitted the verdict on alternative theories, only one of which has been later held not to be within the statute. In such a case, it will not be possible to determine to a certainty that the prisoner's conviction was for activity now regarded as innocent. And the judicial institution, having operated consistently with the framework of perceived law, will be frustrated

189. See text accompanying notes 191-92, 198-200 *infra*.

because reprosecution may now be impracticable or impossible. Because of the greater time lapse involved, this is a consideration that applies to habeas corpus more strongly than to appeal.

Judicial efficiency and protection of reliance tend to blend with the value of stability in this context. Stability seems to be in a sense society's interest in protecting its own institutional reliance on announced law, and protection of reliance by the judicial institution is, in part at least, for the protection of that institution's efficiency. But judicial efficiency is broader than the value of stability in at least this sense: Numerous habeas corpus applications and reprosecutions because of the decision to apply new precedent retroactively may impose an added burden on the judicial institution; but this burden can be alleviated without denying retroactive application in habeas corpus cases by legislation increasing the capacity of the institution.

The impairments of stability, judicial efficiency, and reliance wrought by retroactive application on habeas corpus of a new precedent contracting criminal responsibility do not, on the whole, seem to be much greater than those encountered when the new rule is applied retroactively on appeal. The values of equality and the image of justice, on the other hand, are equally vocal in demanding retroactive application in both instances. That the liberty or life of the individual is involved makes these demands even more insistent, and it is not difficult to conclude that in either instance the prisoner who is innocent of crime under the newly announced rule should be released.

Now we are come to the question of the effect to be given overruling—or at least "new"—decisions which expand constitutional protection of persons accused of crimes. As to most of these developments, the decision has already been made in favor of retroactivity, even where convictions have become final. In point are the decisions expanding the right to counsel,[190] the indigent's right to a free transcript where necessary to an appeal,[191] and the right to exclusion from evidence of confessions regarded as voluntary when made but subsequently held to

190. Escobedo v. Illinois, 378 U.S. 478 (1964); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963). The rule announced in *Gideon* was applied retroactively on habeas corpus in Doughty v. Maxwell, 376 U.S. 202 (1964) (per curiam), and in Pickelsimer v. Wainwright, 375 U.S. 2 (1963) (per curiam).

191. Griffin v. Illinois, 351 U.S. 12 (1956), applied retroactively on habeas corpus in Eskridge v. Washington State Bd., 357 U.S. 214 (1958). But in Norvell v. Illinois, 373 U.S. 420 (1963), release on habeas corpus on the basis of *Griffin* was denied because no one was able to transcribe the notes of the court reporter, who had died, and the witnesses were unable to remember what had happened at the trial.

be coerced.[192] The possibility of refusing retroactive application is never directly discussed by the Court in these cases,[193] but it seems clear what the relevant values were.

The first thing to note is that all of these rules are concerned directly with "equality"—though not in quite the sense which we have used the word—in that they are designed to screen out irrelevant factors in the adjudication of guilt or innocence. Thus they screen out effects of indigence, coercion in the pretrial stage, and the like, because these elements are irrelevant to and tend to impede the finding of a just verdict. The upshot, of course, of suffering these factors to play a part is that people in like circumstances are apt to be treated differently in the absence of any relevant differentiating factor. Certainly the rejected rule had no greater tendency to provide adequate differentiation between innocent and guilty before the overruling decision than it has afterwards. Because these rules are concerned with promoting fundamental fairness, they have substantial ethical content. At least where the denial of a procedural right has appreciably increased the risk of a miscarriage of justice, the values of equality and the image of justice urgently call for making the new rule retroactive.

Rather than dwell on the above situations, I propose to proceed to the *Mapp v. Ohio*[194] problem which, it seems to me, involves similar considerations. Just as habeas corpus presents a harder case for retroactive application than does a direct appeal from a judgment of conviction, *Mapp* presents a harder case in the context of habeas corpus than the other departures from precedent that expand the constitutional requirements of criminal procedure. *Mapp* held that exclusion of evidence obtained in violation of the fourth amendment is a requirement of due process imposed upon state criminal prosecutions by the fourteenth amendment, and thereby revised the precedent previously established in *Wolf v. Colorado*[195] on this subject. But to understand the development of the *Mapp* doctrine, it is necessary to consider four different periods. During the first, prior to *Weeks v. United*

192. *E.g.*, Rogers *v.* Richmond, 365 U.S. 534 (1961), which was applied retroactively on habeas corpus to invalidate a 1936 conviction in Reck v. Pate, 367 U.S. 433 (1961).

193. It is occasionally mentioned in concurring or dissenting opinions, as in Justice Frankfurter's concurring opinion in Griffin v. Illinois, 351 U.S. 12, 25-26 (1956). For a close dissection of the *Mapp* case looking for clues of possible intention, and concluding that the evidence is inconclusive, see Bender, *The Retroactive Effect of an Overruling Constitutional Decision*, 110 U. Pa. L. Rev. 650, 660-71 (1962).

194. 367 U.S. 643 (1961).

195. 338 U.S. 25 (1949).

States,[196] the Court had held that the fourth amendment did not require exclusion, even in federal courts, of illegally seized evidence. A civil remedy against the violator was regarded as sufficient sanction for the search and seizure provisions. *Weeks v. United States* reversed this position to recognize a separate constitutional right under the fourth amendment to exclusion of such evidence in federal prosecutions, but the fourth amendment provisions on search and seizure—including the *Weeks* rule—were still not regarded as elements of due process imposed on state courts by the fourteenth amendment. In *Wolf v. Colorado*[197] the Court held that the rudiments of the fourth amendment search and seizure provisions do constitute elements of due process that bind the states, but expressly held that the *Weeks* rule was not constitutionally binding upon the states. Finally *Mapp* did for state criminal proceedings what *Weeks* had done for federal, by holding that the Constitution prohibits admission of evidence obtained in violation of the fourth amendment provisions. Thus in a sense *Mapp* came not to overrule *Wolf's* doctrine but to fulfill it. In a narrower and pragmatic sense, of course, *Mapp* is an overruling decision.

An argument has been made with great persuasiveness that the *Mapp* rule ought not to be applied retroactively in habeas corpus cases. The argument is based upon analysis of the purpose of the *Mapp* rule. One writer has suggested the following criteria for determining the question of retroactive application generally:

> In deciding whether to give a new rule retroactive effect, a court to which the issue properly has been presented first should attempt to identify the purposes of the new rule, next should determine whether on balance those purposes will be served by general retroactive application of the new rule, and finally should decide whether these purposes will be promoted by retroactive application of the new rule in the particular case before it.[198]

In a contemporaneous article, Professor Paul Bender set forth a similar test in language specifically referring to *Mapp*:

> [T]he reason which seems principally to have motivated the Court to exclude unconstitutionally seized evidence from state criminal

196. 232 U.S. 383 (1914).

197. 338 U.S. 25 (1949).

198. Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 942 (1962).

> trials does not appear to apply in general to past trials. If the primary constitutional purpose compelling state exclusion of unconstitutionally seized evidence will not be served by a sweeping reexamination of past convictions, then, especially in view of action taken by the states in legitimate reliance upon *Wolf*—some of it irrevocable—there is no reason not to say that *Mapp*, generally, should be applied only prospectively.[199]

Both versions of the argument are oriented primarily toward the "purpose" of the newly announced rule. Once the purpose is ascertained, at least one author does contemplate that a balancing process of some kind must follow: if the purpose of the new rule can be adequately served by prospective application, and there appears to be any countervailing factor rendering retroactive application unduly burdensome, the rule ought not to be applied retroactively.[200] Both conclude that the exclusionary rule of *Mapp* "is primarily designed to eliminate an encouragement which would otherwise exist for police to ignore constitutional limits upon their conduct, thus protecting everyone, guilty and innocent, from improper searches by tending to make them fruitless no matter what is discovered."[201] Thus, it is argued,

> a court deciding the issue of retroactivity of the *Mapp* rule should ask: Would the release from prison of every person whose conviction was based upon illegally seized evidence have any effect in deterring unconstitutional searches? Assuming a finding of some deterrent effect, would it be substantial enough to outweigh the undesirability of reversing the convictions of many assumedly guilty prisoners?[202]

This undesirability arises not only from the obvious source, the release of apparently guilty prisoners, but also from substantial impairment of values of more general relevance. Retroactive application of the *Mapp* rule in habeas corpus cases would, to some extent, clog the channels of judicial administration, requiring many hearings to determine whether past convictions were based on evidence seized in violation of the rule—a matter that often will not appear of record in pre-*Mapp* convictions.[203]

199. Bender, *supra* note 197, at 660.

200. Note, 71 YALE L.J. 907 (1962).

201. Bender, *supra* note 197, at 660-61.

202. Note, 71 YALE L.J. 907, 942 (1962).

203. See Bender, *supra* note 197, at 655:

> If *Mapp* should be applied broadly to previous trials through these remedies, it is difficult to say why almost every state prisoner in an 'admission' state who

It is likely that in many cases reprosecution of the prisoner will be impossible or difficult because of the unavailability, years after the alleged crime, of evidence and witnesses, and possibly because of jury reluctance to impose punishment on state facts.[104] Wholesale release of apparently guilty prisoners may also have an undesirable effect on the law-enforcing institutions generally; morale of enforcement personnel and public respect for the efficacy and certainty of punishment would be diminished.

Both authors resolve the balance in favor of denying retroactive effect to the *Mapp* rule in habeas corpus cases.[205] Four of the circuits have joined in this resolution.[206] Two, or possibly three, have rejected it.[207] The question is presently pending on certiorari in the Supreme Court.[208]

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has been convicted through officially obtained nontestimonial proof cannot in good faith demand at least a hearing to determine how that proof was obtained—to determine, for example, whether there was sufficient cause to make a search or an arrest preceding a search.

204. Consider in this connection these remarks made about *Gideon*:

> Indeed, those prisoners who have committed the more serious crimes and who are thus serving the longer sentences may be the primary beneficiaries of our ruling. Because they have been incarcerated for a longer period and in view of the fact that more time has thus elapsed since the commission of their crime, it will be the hardest to retry precisely those offenders who, in the interests of an ordered society, should least be permitted to remain at large.
>
> Finally, the District Courts may find it difficult to determine whether those tried in the remote past were indeed denied the assistance of counsel. Records may be stale, incomplete, or missing, and it may hence be difficult accurately to reconstruct events at prosecutions long ago and far away.
>
> These prospects are deeply disturbing. Here, however, the fundamental nature of the right protected by Gideon v. Wainwright and the injustice attendant upon the continued imprisonment of those defendants who have been denied representation by counsel at an important stage of a criminal prosecution, have precluded the limitation of Gideon to prospective application.

United States *ex rel.* Durocher v. La Vallee, 330 F.2d 303, 312-13 (2d Cir.), (en banc; opinion per Kaufman, J.), *cert. denied*, 377 U.S. 998 (1964).

205. Bender, *supra* note 197; Note, 71 YALE L.J. 907 (1962).

206. United States *ex rel.* Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963), *cert. granted*, 377 U.S. 930 (1964) (No. 1125, 1963 Term; renumbered No. 95, 1964 Term); Gaitan v. United States, 317 F.2d 494 (10th Cir. 1963); United States *ex rel.* Angelet v. Fay, 333 F.2d 12 (2d Cir.), *cert. granted*, 379 U.S. 815 (1964) (No. 578); Sisk v. Lane, 331 F.2d 235 (7th Cir. 1964).

207. United States *ex rel.* Campbell v. Rundle, 327 F.2d 153 (3d Cir. 1964) (dictum); Walker v. Peppersack, 316 F.2d 119 (4th Cir. 1963); Hall v. Warden, 313 F.2d 483 (4th Cir.), *cert. denied*, 374 U.S. 809 (1963); California v. Hurst, 325 F.2d 891 (9th Cir. 1963) (applying same test as cases cited in note 206 *supra*, but with contrary result).

208. Linkletter v. Walker, 377 U.S. 930 (1964) (No. 1125, 1963 Term; renumbered No. 95, 1964 term); United States *ex rel.* Angelet v. Fay, 379 U.S. 815 (1964) (No. 578).

I cannot agree with the starting point of this approach to the problem. It purports to be a pragmatic approach, seeking the result that will further to the maximum extent possible the "purposes" or "interests" that are at stake. But it limits itself to the "purposes" of the newly announced rule, and to the "interests" of the judicial and law-enforcing institutions. It fails to take account of the other values that are affected by departure from precedent. And other values are uniquely affected when rules that govern punishment for criminal conduct are changed. No Blackstonian conceptualism is required to identify values demanding that a new and higher standard of due process be applied retroactively. For what Blackstonian conceptualism does is to apply to legal judgments an assumption that we do in fact commonly make with regard to ethical judgments: that they are of universal and eternal validity. In the older common law tradition from which Blackstone derived his legal ideology, this seemed unquestionable because common law was identified with natural law, and both with "the perfection of reason."[209] Today, of course, our claims for judicial decisions are much less ambitious. We recognize that natural law "was guilty of the Duchess' fallacy in *Alice in Wonderland*: it insisted that everything must have a moral in a universe full of the irrelevant, the inane, the neutral, the fatuous, and the frolicsome."[210] But when we move from applications of substantive law to applying more distinctively ethical notions such as "justice," "the rule of law," "due process," and "fundamental rights," we tend even today to assume that our propositions in these areas are universally valid—or at least to speak and act as if they were. And whether or not this tendency is philosophically justifiable, it has the undoubted result that inequalities in the application of such propositions will offend our sense of justice much more deeply than unequal application of more everyday legal propositions. In practical terms, this means that any new determination of the requirements of "due process" will prima facie be expected to apply to all trials whatsoever, even when these are long past. In short, the values of equality and the image of justice are thrown into special prominence by any new rule of due process, and by *Mapp* no less than by *Gideon v. Wainwright*[211] or *Griffin v. Illinois*.[212] Any attempt

209. See Sir Edward Coke in 1 Co. Litt. 97b, and in Calvin's Case 7 Co. Rep. 1a, 19a, 77 Eng. Rep. 377, 399 (K.B. 1608). On the Blackstonian history see Boorstin, The Mysterious Science of the Law 25-30, 120-38 (Beacon Press ed. 1958); Cahill, Judicial Legislation 9-10 (1952). See also notes 7-8 *supra* and accompanying text.

210. Cahn, The Sense of Injustice 12 (1949).

211. 372 U.S. 335 (1963).

212. 351 U.S. 12 (1956).

at a solution to the problem of retroactive application of *Mapp* in habeas corpus cases that fails to take these values into account falls woefully short of adequacy.

I am willing to concede that retroactive application of the *Mapp* rule in habeas corpus cases would considerably impair the values of stability, judicial efficiency, and (in a sense)[213] protection of reliance upon perceived law. But this is true of retroactive application on habeas corpus of all the other decisions expanding due process protections of criminal defendants,[214] and certainly does not justify any *ipse dixit* conclusion that any of these rules may properly be ignored in habeas corpus proceedings. It seems clear that the values of equality and the image of justice forbid this. In the *Mapp* situation the question is whether the same values require the same result.

First of all, it appears that the value of equality is impaired to some extent by refusal to apply *Mapp* retroactively, whether on habeas corpus or when a pre-*Mapp* conviction is reviewed directly on appeal, for the obvious reasons that *Mapp* embodies a rule, whatever its ethical content, and that there is no relevant differentiating factor to justify treating one accused person differently from another in this respect. The main thrust of the argument against applying *Mapp* retroactively on habeas corpus appears to recognize this, but to regard the denial of equality as irrelevant or unimportant because the purpose of the *Mapp* rule is said to be exclusively deterrence of the condemned methods of obtaining proof of guilt. The point appears to be that the freedom from interference that is protected by this institutional restraint is not the individual interest of the accused person, but the interest of society at large. In this the *Mapp* rule is said to differ from the other expansive due process interpretations. The argument does not deny that equality is to

213. Protection of societal reliance on perceived law is, it seems to me, indistinguishable from the institutional value of stability.

214. There are variations in the extent to which stability will be impaired, however. Thus retroactive application of Griffin v. Illinois, 351 U.S. 12 (1956) on habeas corpus might require only that the prisoner be released unless he is given a free transcript and an appeal, rather than a full reprosecution. Retroactive application on habeas corpus of Gideon v. Wainwright, 372 U.S. 335 (1963), or Escobedo v. Illinois, 378 U.S. 478 (1964), on the other hand, like retroactive application on habeas corpus of *Mapp*, would necessitate reprosecution, which well may be impossible as a practical matter. In one respect only would the *Mapp* rule have more devastating effect on stability than any of the others. Past resort to unconstitutional searches and seizures would render crucial evidence—perhaps the state's only evidence—inadmissible at the reprosecution, and thus effect a somewhat broader frustration of the law-enforcing institution than past denials of right to counsel or other due process rights if retroactively condemned via habeas corpus.

some extent impaired by refusal to apply *Mapp* retroactively; it asserts, rather, that the impairment is of small gravity because the rule only accidentally and collaterally produces the release of convicted defendants. Thus, according to the argument, the image of justice is not seriously damaged by refusing to apply the rule to past convictions on habeas corpus.

I think that this argument raises afresh the problems of separation of powers and the permissible scope of judicial power. While I think it perfectly obvious that courts must and should "make" law, and that they can do it better and more fairly if permitted the technique of prospective limitation, I do not think this means that courts should avail themselves of every other tool in the legislative kit-bag. Consider, in this light, the double-edged social problem involved in the *Mapp* case. A legislative body has access to various ways to deter police from improper invasions of privacy. Criminal liability could be imposed, as could civil penalties, reduction in rank, loss of seniority, or perhaps dismissal. Any of these means might be adopted without creating any private right, either to compensation in damages or to exclusion of evidence so obtained in a criminal trial of the victim of the wrongful invasion.

A court does not have such a wide choice. It does not generate duties or regulations of police conduct in the abstract. It recognizes rights that are enforcible in litigation before it. It may, and I think it should, postpone recognition or enforcement of a right, and of its corresponding duty, in circumstances where the relevant values are aligned to demand prospective limitation. But the thesis advanced in support of prospective limitation of the *Mapp* rule is essentially that it was never intended to create any right, but only to produce a duty, only to regulate police conduct. The constitutional right the Court appears to have recognized, the argument implies, was produced only to permit the Court to promulgate a more effective restriction on police practices. I suggest that here is a line courts should not—and the Supreme Court in *Mapp* did not—cross, a line that marks the outer limit of judicial, as distinguished from legislative, power. I do not believe that the Court should, or would, attempt to deal in duties not otherwise enforceable before it by manufacturing bogus private constitutional rights. Yet the "deterrent purpose" interpretation of the *Mapp* decision necessarily implies that no criminal defendant—whether before or after *Mapp*—has any genuine interest or right, much less

a constitutional right, to the protection against conviction on the basis of illegally seized evidence afforded by the *Mapp* rule.

The only theory that might be urged to legitimate the "deterrent purpose" interpretation of *Mapp*, and thus leave the door open to refusal to apply *Mapp* retroactively without doing violence to a fundamental private constitutional right, ethical in content, is one which would regard the *Mapp* rule as not recognizing any unique constitutional right to exclusion of unconstitutionally seized evidence, but rather as recognizing standing in Miss Mapp to assert a right to be free from unconstitutional searches and seizures secured by the fourteenth amendment to all persons. Viewed in this light, Miss Mapp's case provided the Court with an opportunity to adopt the most effective means of protecting the constitutional right that every person—whether innocent or guilty of crime—enjoys under the fourth amendment. But constitutional rights are personal rights. And the Court in *Weeks* recognized that a constitutional wrong was done Weeks by the court which admitted the illegally seized evidence.[215] In such a situation the wrong does not end with the seizure. The seizure of the evidence and its use are all of a piece, a single course of unconstitutional action, a single instance of lawless law enforcement. The violation of Miss Mapp's constitutional right, no less than the violation in *Weeks*, consisted in retention and use of the seized property as well as its seizure, and continued until the property was returned and all effects of the seizure were expunged. As was said in *Weeks*,

> [T]he letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant; . . . there was involved in the order refusing the application [for their return] a denial of the constitutional rights of the accused, and . . . the court should have restored the letters to the accused.[216]

If there is a constitutional right to the only effective correction of this constitutional wrong—the return, unused, of the property—it seems clear that the probative value of the property as evidence against the accused is irrelevant to his overriding constitutional right.

Mapp, like other decisions expanding the concept of due process in the same area, should be viewed as simply recognizing a constitutional right—here, a right to the exclusion of unconstitutionally obtained evi-

215. Weeks v. United States, 232 U.S. 383, 398 (1914).
216. *Ibid.*

dence. Certainly *Mapp* seems to have more in common with these other decisions than it has to set it apart. Any view that a rule such as that announced in *Gideon v. Wainwright*,[217] for example, is exclusively or even primarily concerned with the possibility of erroneous convictions under a practice recognizing a less extensive right to counsel seems mistaken. The prevailing practice under *Betts v. Brady*[218] already invalidated similar convictions upon the showing of any possibility of prejudice resulting from denial of right to counsel.[219] The burden of *Gideon*, then, is essentially that prejudice is immaterial. A prosecuting government might conclusively establish the absence of any possibility of prejudice, and prove guilt beyond any shadow of a doubt, yet still the convicted defendant's fundamental constitutional rights have been violated, and he must be released and reprosecuted according to the constitutional ritual if punishment is to be imposed. In light of the values discussed throughout this Article, a change like that in *Gideon* should be given retroactive effect, and the Supreme Court has done so.[220]

I do not think that *Mapp* stands on any significantly different footing from *Gideon*. In *Mapp*, it is true, the right is not in any way derived, as it is in *Gideon*, from unreliability of the condemned practice as a determinant of guilt, but it is a right that has similarly been accorded constitutional stature, and the rule, like the rule of *Gideon*, has been recognized as part of the constitutionally required ritual that must precede imposition of criminal punishment. As Professor Fuller has put it, due process is required "not merely to protect the innocent person against the possibility of an unjust conviction, precious as that objective is. The purpose . . . is to preserve the integrity of society itself. It aims at keeping sound and wholesome the procedures by which society visits its condemnation on an erring member."[221]

Whatever may be said of the constitutionally required ingredients of a "sound and wholesome" criminal procedure, it seems to me that they are obviously more comprehensive than a single requirement that has to do with reliability of determinations of guilt. Science may yet devise a satisfactorily or totally reliable lie-detecting device, but its reliability would not cure the constitutional deficiency of a criminal procedure that

217. 372 U.S. 335 (1963).
218. 316 U.S. 455 (1942).
219. See Harlan, J., concurring in Gideon v. Wainwright, 372 U.S. 335, 350-51.
220. Eskridge v. Washington State Bd., 357 U.S. 214 (1958).
221. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30, 35, 37 (Berman ed. 1961).

imposed the device on unwilling defendants. There was nothing unreliable, for example, in the narcotics capsules retrieved by the police from Mr. Rochin with a stomach pump,[222] but reliability did not render the procedure acceptable in the ritual of imposing criminal punishment. Of course the *Rochin* decision had some impact on future police practices, but I doubt that Rochin's constitutional right would have been less even if California had already had strong statutory measures to deter the condemned police practice by denouncing it as criminal or discouraging it in other ways.

So it is, I think, with *Mapp*. The interrelated societal interests in the liberty of the individual and in the integrity of the law-enforcing institutions must not be lost sight of. The *Mapp* decision seems to me to represent a meshing of these interests. If one accepts this understanding of *Mapp*, it becomes at once apparent that invalidation of the *Mapp* conviction was at once a remedy for the invasion of Miss Mapp's constitutional right and an appropriate measure to weed out an excess in the administration of criminal law, to maintain the integrity—the soundness and wholesomeness—of the criminal law-enforcing institutions at a constitutionally acceptable level.

It thus seems clear that the *Mapp* decision is inadequately explained by reference solely to its deterrent effect. Miss Mapp had a constitutional right to a "fair" trial, and trial fairness is not exclusively a matter of intrinsic accuracy in the determination of guilt or innocence. Her right had been violated, and the integrity of the state criminal law-enforcing institution impaired, by a failure to observe one of the requirements of due process. Both wrongs could be redressed only by invalidation of her conviction. To the extent that it is sound, the *Mapp* rule is essentially ethical in content, no less than the rule in *Gideon*, and thus implies a claim that it has always been sound. Miss Mapp's restoration to her own status quo ante under compulsion of the fourteenth amendment implies that every person whose constitutional right not to be convicted on the basis of unconstitutionally obtained evidence has been similarly violated—at whatever time—should also be restored to his own status quo ante. And the integrity of law-enforcing institutions—which are judicial institutions—requires the same result. It is this, rather than callous unconcern for the values of stability and efficiency of our judicial institutions, that has led the Court to apply its current conception of constitutionality retroactively—sometimes on appeal, sometimes on habeas corpus—in other cases involving the imposition of

222. Rochin v. California, 342 U.S. 165 (1952).

criminal punishment. The values of stability, certainty, and judicial efficiency have been involved in varying degrees, depending largely upon whether direct review or habeas corpus was being sought. But in all the cases, whether on appeal or habeas corpus, the value of equality and the image of justice demanded retroactive application. If the writ of habeas corpus were not statutorily available to reach persons who are currently imprisoned on the basis of criminal prosecutions that are deficient by present constitutional standards, I am led to wonder if the Constitution would not supply the omission. But since the statute is available, I cannot imagine that it should be judicially fenced off to perpetuate the effect of past excesses of criminal law administration currently subjected to constitutional condemnation.

The Court's decisions elevating the standards of criminal due process have these two things in common: They are judicial decisions, rather than legislative enactments. And they alter not our everyday substantive or mechanically procedural law, but rather the fundamental law that we hopefully, perhaps naively, but in any event relentlessly, regard as embodying principles of universal application, as good for yesterday as for tomorrow, for the poor untutored Indian as for a Blackstone, Coke, or Pound.

A legislative body might give or take away some additional procedural protection, or change a rule of substantive law, and do so prospectively only. Equality would be impaired, and yet no great outcry would be evoked. Courts may properly, and in fact have, also limited newly announced rules to prospective application. But a court is not primarily a law-making institution. It must resolve disputes, and in a way not too offensive to the onlookers. Prospective limitation by judicial decision is acceptable only when the values of equality and the image of justice are not too seriously at stake; and the image of judicial justice is different from that of legislative justice. But even a legislative body would be turned out if it enacted into law a prosposition for which it claimed universal truth and withheld the beneficence for future generations.